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REPORTS
OF
CASES ARGUED AND DETERMINED
IN THE
SUPREME COURT
OF THE
STATE OF WISCONSIN,
WITH
TABLES OF THE CASES AND PRINCIPAL MATTERS.

O. M. CONOVER,
OFFICIAL REPORTER.

VOLUME XLVII
CONTAINING CASES DETERMINED AT THE JANUARY AND AUGUST TERMS, 1880.

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JUDGES OF THE SUPREME COURT

OF THE

STATE OF WISCONSIN

DURING THE PERIOD COMPRISED IN THIS VOLUME.

EDWARD G. RYAN, CHIEF JUSTICE.

ORSAMUS COLE,	}	ASSOCIATE JUSTICES.
WILLIAM P. LYON,		
DAVID TAYLOR,		
HARLOW S. ORTON,		

Attorney General, - ALEXANDER WILSON.

Clerk, - . . - CLARENCE KELLOGG.

MEMORANDUM.

This volume contains all but nine of the cases, not previously reported, which were finally disposed of prior to January 7, 1880, together with five which were so disposed of subsequently to that date.

The appearance of the volume has been delayed about a month, partly by illness of the reporter, and partly by an unusual pressure of work in the printing-office.

O. M. C.

MADISON, *March 8, 1880.*

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CASES DETERMINED

AT THE

January Term, 1879.

PRICE vs. MACE, Administrator, etc.

ESTATES OF DECEDENTS: Several administrations: *How far judgment against one administrator evidence in action against another.*

1. Where there are several administrations of an intestate estate, in different jurisdictions, a judgment against one administrator does not bind another.
2. Whether and how far judgments against the *principal* administrator, accompanied by proof that there are no assets in his hands to satisfy them, would be *evidence* in a court which had granted *ancillary* letters, *quære*.
3. It is the place of the intestate's domicile at the time of his death, and not the place of his death, which determines the principal administration.
4. Where letters of administration on the same estate were granted in this and another state, and both describe the intestate as *of that place*, a judgment against the foreign administrator is not even *prima facie* evidence, in an action against the Wisconsin administrator.

APPEAL from the Circuit Court for *Grant* County.

In October, 1873, the circuit court for Sullivan county, Indiana, appointed James L. Berry administrator of the estate of Russel Atkins, then recently deceased in said county. Thereafter an action was brought against said Berry as such administrator, by *Nancy Price*, on an account against the estate of said decedent "for boarding and lodging the de-

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ceased, and caring for him in his sickness and during his last illness, from November 2, 1870, till August 19, 1873," amounting to \$430. In January, 1874, said circuit court rendered, as is alleged in the complaint herein, a judgment in favor of the plaintiff in said action. Afterwards said *Nancy Price* presented a claim for the amount of said judgment to the commissioners appointed by the county court of Grant county in this state to determine claims against the estate of said Russel Atkins. The claim having been disallowed by the commissioners, this action was brought thereon, against *George W. Mace*, who had been appointed by said county court of Grant county in December, 1873, administrator of the estate of said decedent.

The answer of the administrator herein alleges, among other things, that said claim was fraudulent, and that no notice of said claim, suit or pretended judgment was ever served upon the defendant, and no summons in said action or notice of said claim was ever served upon or given to any of the heirs-at-law or legal representatives of the deceased.

On the trial, plaintiff offered in evidence certified copies of certain proceedings in the circuit court for Sullivan county, Indiana, including the alleged judgment in her favor. Defendant objected to the evidence on various grounds, including the following: "3. Because such pretended judgment is not between the parties to this action or their privies, and is not evidence for any purpose against this defendant." The evidence was rejected; the defendant had a verdict and judgment; and plaintiff appealed.

The cause was submitted for the appellant on the brief of *Bushnell & Clark*:

The deceased was domiciled in Indiana. The administration there is the principal one, and that here merely ancillary. *Stevens v. Gaylord*, 11 Mass., 256; *Dawes v. Boylston*, 9 id., 337; *Churchill v. Prescott*, 3 Bradf., 233. Plaintiff's claim has been allowed and passed into a judgment in due form of

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law, by the circuit court for the proper county in Indiana. Under the constitution and statutes of the United States, that judgment is entitled to the same faith and credit in this state as in Indiana. Where a judgment is rendered in one state by a court of competent jurisdiction, with jurisdiction of the parties, its merits cannot be questioned by the courts of other states. A decree against the primary administrator, at an intestate's domicile, is conclusive upon the subsidiary administrator. *Churchill v. Prescott*, *supra*; *Suarez v. Mayor*, 2 Sandf. Ch., 173. This record would therefore have made out at least a *prima facie* case. If there was any fraud in obtaining the judgment, that was for the defendant to establish.

A. W. Bell, for the respondent:

1. The authority of a personal representative is strictly limited to the state from which it is derived. 3 Redf. on Wills, 24-31, with note 10 on p. 26, and note 12 on p. 27; 2 Kent's Com., 434-5; 1 Pinney, 65. And there is no *privity* between administrators appointed in different states. 2 Redf. on Wills, 18; 12 Am. R., 106; *Leonard v. Putnam*, 51 N. H., 247. The judgment on its face only purports to bind the assets in the hands of the Indiana administrator. It would not be conclusive against the heirs of the deceased even in Indiana. *Kent v. Kent*, 3 Thomps. & Cook, 630; U. S. Dig., N. S., 457. A judgment against personal representatives in one state forms no ground of action against personal representatives in another state. 3 Redf. on Wills, p. 26, sec. 9, note 10, and authorities there cited; *id.*, p. 27, note 12; Story on Conflict of Laws, §§ 513, 522; *Brodie v. Bickley*, 2 Rawle, 431; *Mothland v. Wireman*, 3 Penn., 185; *Talmage v. Chapel*, 16 Mass., 71; *Goodall v. Marshall*, 14 N. H., 161; *Hill v. Packer*, 13 How., U. S., 458. 2. To establish a right through a judgment of a foreign state, it is necessary to show that the foreign court had jurisdiction of the matter in controversy, as well as of the parties. In this alleged record there is no

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pleading on the part of the alleged parties, and nothing to show how the circuit court for Sullivan county acquired jurisdiction. It is clear that a similar paper, purporting to be the record of a circuit court of this state, would be insufficient to show a valid judgment; and, in the absence of proof to the contrary, it must be presumed that the laws of Indiana are like our own. *Rape v. Heaton*, 9 Wis., 328; *Walsh v. Dart*, 12 id., 635.

RYAN, C. J. The rule seems to be universal, that, where there are several administrations of an intestate, in different jurisdictions, a judgment against one administrator does not bind another.

"Where administrations are granted to different persons in different states, they are so far deemed independent of each other, that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator." Story's Conflict, § 522. In another place, commenting upon *Mackey v. Cox*, 18 Howard, 100, the same learned writer says: "The true law in regard to ancillary administrations is here stated by NELSON and CURTIS, JJ., that, this being an ancillary administration, it depended upon the discretion of the orphans' court which granted it, whether the money remaining in the hands of the ancillary administrator, after the satisfaction of all claims in this jurisdiction, should be distributed here by the ancillary administrator, or remitted to the principal administrators for distribution; and until that direction shall be executed, and the ancillary administrator directed which course to pursue, he is in no default." See. 529 *d.* So it is said in 3 Redfield on Wills, 26: "Hence, where there is a principal administration in the place of the domicile of the decedent, and in other states there are

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creditors and estate, real or personal, belonging to the estate, there accrues a right to an auxiliary or ancillary administration, as it is called, since it is subsidiary and, as it were, supplemental to the principal administration. But these administrations are regarded as wholly independent of each other; so much so that a judgment recovered against the personal representative of the estate in one state forms no ground of action against such representative in another state. But it must be conceded that, where there are no creditors beyond the limits of the principal administration, there is no reason why the debtors of the estate may not, by making payment to the personal representative in the place of the principal administration, obtain a valid release of the cause of action."

This doctrine is amply affirmed by authorities cited by the learned counsel for the respondent, and others. *Aspden v. Nixon*, 4 How., 467; *Stacy v. Thrasher*, 6 How., 44; *Low v. Bartlett*, 8 Allen, 259, and other cases.

There might be a contingency, however, in which this sweeping rule would operate hardly. The principal administration of the estate of an intestate is at the place of his domicile at death. Administration in another jurisdiction is ancillary. And where there is a surplus for distribution in an ancillary administration, the cases seem all to agree that, though the distribution must follow the *lex domicilii*, yet it is discretionary with the court granting the ancillary letters to transmit the surplus to the principal administrator, or to distribute it for itself. In such a case, there might be judgments against the principal administrator, without assets in his hands to satisfy them. In that case, it seems hard to drive creditors, who had fairly litigated their claims against the principal administrator, to litigate them *de novo* against the ancillary administrator. Whether and how far judgments against the principal administrator, accompanied by proof that there are no assets in his hands to satisfy them, should be evidence in a

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court which had granted ancillary letters, might, perhaps, be regarded as a question not absolutely settled by the authorities. They leave such an effect of such judgments, however, in very great doubt.

But this question is not in the case now before the court. The appellant relied in the court below solely on her judgment in the Indiana court. Counsel assumes that the principal administration is in Indiana, because the intestate died there. But it is the place of domicile, not of death, which determines the principal administration. And the letters of both courts, Indiana and Wisconsin, describe the intestate as late of that place. Neither party gave evidence tending to settle the question.

In these circumstances, the court cannot hold the judgment in Indiana as even *prima facie* evidence against the administrator in Wisconsin.

By the Court.—The judgment of the court below is affirmed.

SENGPEIL VS. SPANG.

APPEAL FROM JUSTICE'S COURT. *Liability of surety in undertaking to stay proceedings.*

Since sec. 229, ch. 83, R. S. 1849, was superseded by sec. 259, ch. 8, title 2 of the Code of Procedure of 1853 (R. S. 1853, ch. 120, sec. 203; R. S. 1878, sec. 3756), if an appeal from a justice's judgment be dismissed by the circuit court at the instance of the appellant, while the judgment of that court may go against the surety in the statutory undertaking to stay proceedings on the justice's judgment pending the appeal (as well as against the appellant), yet the surety is not liable on the judgment of the justice.

APPEAL from the Circuit Court for Iowa County.

Defendant appealed from a judgment rendered against him as surety in an undertaking on appeal from a justice's court to the circuit court.

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M. J. Briggs, for appellant.

J. P. Smelker, for respondent.

ORTON, J. The plaintiffs recovered a judgment against one John Saar before a justice of the peace, from which Saar appealed to the circuit court; and, to stay execution thereon, together with this appellant as surety, executed the undertaking required by sec. 208, ch. 120, R. S. 1858. The appeal was dismissed by the circuit court at the instance of Saar, the appellant, and judgment was in form rendered dismissing said appeal, and for costs against the said Saar and this appellant, as the surety on said undertaking, jointly. This action is brought upon the same undertaking, against this appellant, the surety, alone, to recover the amount remaining unpaid of the original judgment before the justice.

There are several questions raised upon this appeal, which will not be considered, as there is one question of paramount importance affecting the ground of the action, the decision of which will be fatal to the recovery. From a careful examination of the statutes relating to appeals from justices of the peace and proceedings thereon, we are clearly of the opinion that there is a material omission to provide security, either by recognizance or undertaking, for the payment of the judgment of the justice in case of the dismissal of the appeal. Such provision was made by the recognizance required by sec. 229, ch. 88, R. S. 1849, one condition of which was: "Or if his appeal shall be *dismissed* or *discontinued*, that he will pay the judgment recovered against him before the justice, and the interest thereon, with costs of the appeal."

The section was repealed, and the recognizance thereby required superseded by the undertaking provided for in sec. 259, ch. 3, title 2 of the Code of Procedure of 1856, which was adopted without change in the revisions of 1858 and 1878. This very material omission occurred through undue haste, want of intelligent consideration or proper deliberation, in the

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adoption of the New York Code, and through ignorance or disregard of the wisely considered and long established practice in this state, which it superseded and replaced; and is one amongst many omissions and incongruities of that radical and revolutionary change of legal procedure.

The present undertaking provides only for the payment of the judgment of the circuit court against the appellant; and so far it seems this understanding has been made effectual, if it is not entirely exhausted, by the joint judgment for costs against Saar and this appellant, his surety, by the circuit court, upon the dismissal of the appeal. We do not think that such a material omission or defect in the statute, in not providing in terms for the payment of the judgment of the justice on the dismissal of the appeal, by the undertaking to be given to stay the execution thereon pending the appeal, can be cured by construction, where the statute of 1849 so explicitly provides for this precise contingency, and the subsequent statutes fail to so provide even by the widest latitude of implication, and where the liability of the surety is so clearly limited, not only by the law, but by the very terms of the undertaking actually given.

That a surety is not liable, and cannot be charged, beyond the *strict terms* of his engagement, is an elementary principle. Brandt on Suretyship, etc., § 79.

The complaint fails to state a cause of action against the appellant; and the judgment is fatally erroneous because not sustained by the undertaking received in evidence.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded with direction to dismiss the action.

Mappes vs. The Board of Supervisors of Iowa County.

MAPPES VS. THE BOARD OF SUPERVISORS OF IOWA COUNTY.

COUNTIES: PAUPERS. *Liability of county for maintenance of pauper,*

1. Under sec. 1, ch. 34, R. S. 1858, every town was primarily under a legal obligation to relieve and support all indigent persons having a lawful settlement therein; and where, in any county, proper action was taken by the county supervisors as authorized by that statute (sec. 32), to "abolish the distinction between county poor and town poor in such county, and have the expense of maintaining all the poor therein a county charge," this legal obligation was transferred to the county.
2. The fact that a county, in such a case, had procured (under the same chapter) an order from the county judge upon one or more relatives of a pauper, requiring him or them to contribute a certain amount weekly for the maintenance of such pauper, would not, as to other persons, relieve the county from its primary liability for such maintenance.
3. Where, therefore, after such an order had been procured, a pauper was removed from the county poor-house, by order of one of the superintendents of the county poor, and, being also refused a home and support by her relatives, was boarded and cared for by the plaintiff at his public house for some time before he discovered that she was a pauper: *Held*, that the county was liable to him for her maintenance.

APPEAL from the Circuit Court for Iowa County.

Plaintiff filed with the board of supervisors of Iowa county his account, duly verified, against said county, for the board and support of Ann Clayton, a pauper of said county, for a period of fifteen weeks ending July 6, 1875. The total debit was \$75; and there were credits for cash payments by James and Joseph Conley, respectively, amounting together to \$25; leaving a balance of \$50. The account was disallowed, and thereupon plaintiff brought this action to recover the amount.

The court found certain facts which will sufficiently appear from the opinion, and also the following facts: 6. That about ten days after Ann Clayton became an inmate of his hotel, plaintiff was informed that she was a pauper having a legal residence in Iowa county. 7. That \$5 a week was a reasonable charge for her care and support. 8. That no arrangement

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had ever been entered into by the superintendents of the poor of said county with any person for her care and support. As conclusions of law, the court held that it was plaintiff's duty, after receiving the information above stated, to notify the authorities of Iowa county within a reasonable time; that after such time he was not entitled to compensation for the extra care bestowed upon her; and that he was entitled to judgment for \$10.

From a judgment rendered in accordance with this decision, defendant appealed.

The cause was submitted on the brief of *S. W. Reese* for the appellant, and that of *O. C. Smith*, with *Alexander Wilson*, of counsel, for respondent.

COLE, J. The statute clearly imposes the obligation upon every town of relieving and supporting all poor and indigent persons having a lawful settlement therein, whenever they shall stand in need of such support. Sec. 1, ch. 34, Tay. Stats. The law is founded upon the humane idea that a poor person has a right to live, and that when one, through age, disease or misfortune, is unable to procure the means of bodily subsistence, he shall not die from want or exposure, but the property of the town in which he resides shall be chargeable with the expense of his maintenance. The intent and policy of the law upon this subject are too plain to require comment. *Meyer v. The Town of Prairie du Chien*, 9 Wis., 234; *Town of Westfield v. Sauk County*, 18 id., 624. It seems that, by an arrangement made by the county board of supervisors, which the board was authorized to make under chapter 34, the obligation and expense of supporting the poor in Iowa county became chargeable upon the county. Of course, the burden, which would have otherwise rested upon the towns, of maintaining the poor, was shifted to the county. Thus far there is no room for controversy in this case. It is equally clear that

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Mrs. Ann Clayton, at the time she was taken care of and boarded by the plaintiff, in the year 1875, was a poor and indigent person, within the meaning of the statute, and having a legal settlement in the town of Mifflin in said county. The fact is abundantly established by the testimony, and is not denied by the counsel for the defendant, that she had been an inmate of the county poor-house for several years prior to March, 1875. It appears that in October, 1868, the supervisors of the county took steps, under the statute, to compel her sons, Joseph and James Conley, to assist in supporting her. On application of the supervisors of the county, the county judge made an order requiring Joseph and James Conley each to pay the sum of \$1.75 weekly to the county board for the support of their mother, which sum was afterwards reduced to \$1.25 each per week. Thus the county authorities recognized and attempted to discharge the legal obligation resting upon them of taking care of this poor helpless woman; and it is not obvious upon what ground they expected to be exempted from their liability to pay the plaintiff the amount of his claim.

The learned attorney for the county insists that it clearly appears from the evidence that Mrs. Clayton, while she was an inmate of the county poor-house, was supported there in pursuance of a contract between her sons and the county authorities, and that the effect of this arrangement was to relieve the county from all responsibility of providing for her maintenance. We do not so understand either the facts or the law of the case. The statute contains provisions by which certain persons, having sufficient ability therefor, may be compelled to support in part or wholly their poor relatives. This is a compulsory proceeding to enforce what is deemed a natural duty, but it does not amount to a contract. It is a remedy in aid of a public liability, proper and just enough, but does not relieve the public of its obligation to support its paupers.

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For, as we have said, the intent of the statute is to guard against the danger of anyone unable to support himself being left without the very means of sustaining life. Hence, the law wisely and humanely imposes upon the public the burden of providing for the necessities of its poor and destitute. But the fact that the law affords means of enforcing compulsory assistance from relatives in certain cases, does not take away the responsibility of the public in the matter. The primary obligation remains—in this case upon the county,—notwithstanding a remedy is afforded to enforce contribution on the part of relatives. And therefore, to our minds, the evidence is conclusive that Mrs. Clayton was a pauper if there ever was one; her support was chargeable upon Iowa county; and the fact that her sons were made to contribute in aid of the county burden, did not and could not relieve the county from its liability to provide for her support.

We do not deem it necessary, and it certainly is not pleasant, to dwell upon the facts disclosed in this record. The learned counsel for the plaintiff, in his brief, has commented on them with much severity of language, but, perhaps, not more so than the facts warranted. For when one considers the way in which this poor old woman was treated by the public authorities of the county, and neglected by her children, he feels a keen sense of shame and indignation, which it is not easy to repress or give utterance to in mild words. Here was a poor, blind, helpless woman, nearly one hundred years of age, utterly destitute, who had been a county charge since 1868. In the spring of 1874, she was taken from the county poor-house, the only home she had in the world, by direction of one of the superintendents of the poor of the county, and carried "with some goods" to where her children lived. "The goods" were put in a barn, and she was left in the public street "sitting on the woodpile." Her children turned her from their doors, and suffered her to wander about the country, and find shelter and

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food where she could. In March, 1875, she was brought to the public house of the plaintiff, by some one who had sufficient regard for his name to conceal it, and thus save it from the stigma of a base act, and was left with the plaintiff with the false pretense that "she wanted to go off on the train to-morrow." There she was boarded and taken care of by the plaintiff for some time before he learned that she was a pauper, and had thus been imposed upon him by some one to relieve the public from the expense of maintaining her. For the board and lodging thus furnished her, the plaintiff charged the county with the amount claimed in his bill. Most of the claim was disallowed by the court below, as not being a proper charge against the county. As the plaintiff has not appealed, we cannot review this part of the judgment. But, in taking leave of the case, we are constrained to say, that the ingratitude of the children of this aged pauper, and the neglect of the public authorities in discharging their duties in respect to her, are complimentary neither to the affection and filial duty of the former, nor to the humanity and public duty of the latter. "Man's inhumanity to man" is not a mere figment of poetic genius.

By the Court.—The judgment of the circuit court is affirmed.

BURKE VS. BIRCHARD.

REPLEVIN. (1) *What the verdict must determine.* (2) *New trial on reversal.*

1. On trial in the circuit court of an action of replevin commenced in justice's court, where plaintiff had obtained possession under the statute, it appeared that defendant claimed under a chattel mortgage; and the evidence was such that the jury might have found due on the mortgage either \$18, or ninety cents, or nothing. The jury found that defendant was "entitled to the possession" of the property, and assessed its value at \$90, and defendant's damages at ninety cents. The judgment was,

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that defendant recover ninety cents damages, and the costs, and that he "have and retain the possession of said property," and that the officer return it to him. *Held*, error, in that the verdict and judgment should have determined the value of defendant's *special interest* in the property.

2. The jury having found that there is something due on the mortgage, and the proof being that the sum unpaid must be at least ninety cents, the cause is remanded with directions that defendant be permitted, at his option, to take simply a judgment for that sum as damages, with costs; and that otherwise there be a new trial.

APPEAL from the Circuit Court for *Grant County*.

Replevin, commenced before a justice of the peace, for a pair of horses valued in the affidavit for the writ at \$90. The defense is, that the defendant seized the horses as the agent of one Haines, by virtue of a chattel mortgage upon them executed by the plaintiff to Haines. From a judgment of the justice in favor of the defendant, plaintiff appealed to the circuit court. The defendant having failed to give a recognizance to entitle him to a return of the horses, they were delivered to the plaintiff, he having given the recognizance in that behalf required by the statute. Laws of 1873, ch. 120 (Tay. Stats., 1384, § 162).

On the trial in the circuit court, it appeared that the chattel mortgage was given to secure the payment of a note for \$100 and ten per cent. interest, dated December 11, 1875, given by the plaintiff to Haines for a loan of money, on which there had been paid and indorsed \$94.10. The plaintiff claimed that the note was usurious, and the testimony tended to show that the sum actually loaned was only \$95. It also tended to show that the plaintiff paid Haines \$100 on the note. In these particulars, however, there is a conflict of testimony. Haines testified that there was \$18 due him on the note when the horses were seized. This is the verdict: "We, the jury, find the defendant entitled to the possession of the property in question, the estimated value being \$90, and assess the damages at ninety cents." Judgment was rendered upon the ver-

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dict, that defendant recover of the plaintiff ninety cents damages, and costs, taxed at \$35.89; "that the defendant have and retain the possession of said property, and that the officer return said property to said defendant."

From this judgment plaintiff appealed.

For the appellant, there was a brief by *J. W. & J. M. Mills*, and oral argument by *J. M. Mills*.

The cause was submitted for the respondent on the brief of *L. J. Arthur*.

LYON, J. Sec. 152, ch. 120, R. S. 1858, provides as follows:

"Whenever, upon the trial of any such action [referring to an action of replevin in a justice's court], it shall appear that one party has a lien or claim upon the property in question, or a part thereof, to a part of its value only, and that the right of property in the same, subject to such lien or claim, shall be in the other party, in such case the verdict and judgment shall be according to the rights of the parties, and it shall be discretionary with the court whether the judgment shall be for a return of the property, or for damages."

In the case under consideration, the defendant stands in the shoes of the mortgagee, and can only recover what the mortgagee would have been entitled to recover, were he the defendant in the action. The case must therefore be determined on the same principles as though the mortgagee, instead of his agent, were the defendant.

The jury must have found that some portion of the mortgage debt remained unpaid. In such case, the legal title to the property in controversy, and the right to the possession thereof, was in the mortgagee, while the equity of redemption, or equitable title, remained in the plaintiff. Payment of the amount due on the mortgage debt would, *ipso facto*, vest in the plaintiff the absolute title and right of possession. The amount so due was but an insignificant portion of the value of

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the property. If the original loan was but \$95, the usury in the note defeated the right to recover any interest, and but ninety cents of the sum loaned was unpaid. If the note was not usurious, the interest of the mortgagee in the property was only about eighteen dollars. Under the verdict, then, both parties had a claim upon the property, and the case is clearly within the statute above quoted.

The verdict entirely disregards the statute, as does the judgment also. True, the record shows the horses in possession of the plaintiff, and the judgment is that the defendant *retain* them, and that the *officer* return them to him. But these are mere inaccuracies of expression, and we cannot doubt that, under the judgment as it stands, the defendant is entitled to a return of the property, and that his right thereto can only be defeated by paying him the assessed valuation, to wit, ninety dollars.

The plaintiff has a legal right to insist that the verdict and judgment shall determine the amount of the mortgagee's interest in or claim upon the property; and because they do not, the judgment must be reversed. The rule would doubtless be the same, had the action been originally commenced in the circuit court; for, irrespective of any statute, if it appears that the party recovering in replevin has only a limited or special property in the goods in controversy, the general property being in the other party, the jury should assess only the value of the special interest. *Booth v. Ableman*, 20 Wis., 21, and cases cited.

The amount involved in this litigation is so trifling that, although the judgment must be reversed, it is desirable to avoid the expense of another trial. The jury having found that there is something unpaid on the mortgage debt, and the proofs being that the sum unpaid must be at least ninety cents, we have concluded that the defendant may, at his option, take judgment for ninety cents damages, with costs of suit; omitting from the judgment any provision for a return to him of

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the horses. This is most favorable to the plaintiff. If such judgment be not taken, there must be a new trial.

By the Court.—Judgment reversed, and cause remanded for further proceedings as indicated in the opinion.

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CONVERSION. (1, 2) *Under what circumstances the verdict will be reduced to nominal damages.* (3) *Whether defendant in trover, not claiming to own the property, can substitute another person as defendant.* (4) *His right to an action of interpleader; and effect of his failure to take that remedy.* (5) REVERSAL OF JUDGMENT, in a matter usually discretionary with court below.

1. It has been an established rule of the English courts for more than a century (adopted to the full extent in the courts of Vermont, and followed in some cases in other states), that in trover the court will, under certain circumstances, permit the defendant to bring the property into court for plaintiff, with costs up to that time, and will then order a stay of proceedings, or permit plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, if he fails to show special damage, beyond the value of the property at the time of its return; or, upon tender of the property after verdict, it will, in a proper case, reduce the verdict to nominal damages.
2. In this case, it appears clearly from the evidence that the notes of a third person running to plaintiff, which he alleges to have been converted by defendant, came to the possession of defendant either as agent for the plaintiff solely, or (as defendant himself claims) as custodian for both plaintiff and the maker; that defendant never claimed to own or have any interest in them; that he offered, before suit, to surrender them if both parties would agree to the surrender; that immediately after suit brought, he offered to bring them into court, and asked to be relieved from all further responsibility in relation to them; and that he acted in good faith, believing that he had no right to surrender the notes to defendant without the consent of the maker; and it does not appear that plaintiff suffered any special damage from defendant's refusal to deliver them. After verdict against defendant for the full value of the notes, his motion that the verdict be reduced to nominal damages, and the clerk ordered to deliver the notes to plaintiff, having been denied, a judg-

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ment entered pursuant to the verdict is reversed on appeal, with directions to enter judgment in plaintiff's favor for nominal damages and costs, upon surrender of the notes to him.

3. The action, being trover instead of replevin, is probably not within the provision of sec. 22, ch. 122, R. S. 1858 (R. S. 1878, sec. 2610), which provides for substituting a third person as defendant, instead of the actual defendant, in actions "upon contract, or for specific, real or personal property," in certain cases there defined.
4. If defendant, before this action was brought, might have maintained a suit to compel plaintiff and the maker of the notes to interplead, still his failure to do so should only subject him to payment of the costs of this action, and loss of the costs which he might have recovered in the action of interpleader.
5. Although this court will not ordinarily reverse the action of the court below on subjects resting in its discretion, yet this rule does not apply where there has been an abuse of discretion, or that court has apparently acted under a mistaken view of the law.

APPEAL from the Circuit Court for *Clark County*.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover the value of twenty-one promissory notes of one hundred dollars each, given by one T. C. Hartford to the plaintiff, bearing date the 5th day of September, 1877; payable, the first in forty days after date, the second in forty days after the first became due, and the third in forty days after the maturity of the second, and so on, one of said notes maturing at the end of each succeeding forty days after the 5th of September, 1877, with interest at the rate of ten per cent. per annum. The payment of these notes was secured by a chattel mortgage upon a stock of goods owned by the said Hartford, a part of which stock was the consideration for the notes. The notes and chattel mortgage were placed in the hands of the defendant at the time they were executed, with the consent of the plaintiff and the maker.

"The plaintiff claimed that the notes and mortgage were placed in the hands of the defendant with his consent; but he does not explain why they were so placed, except to be held by defendant for collection. After the first note became due,

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the plaintiff demanded that defendant deliver the notes to him. This the defendant declined to do, on the ground, as he claimed, that the agreement between the plaintiff and Hartford was, that the notes should remain in the possession of the defendant until certain other debts, which Hartford owed to other parties, were first paid. This action was commenced on the 12th day of February, 1878.

"It is an action to recover damages for the conversion of the notes by the defendant, and the amount of damages claimed is the amount of the face of the notes, and interest at ten per cent.

"The defendant's answer alleges, that for some time previous to the 5th day of September, 1877, the plaintiff and said Hartford had been, and then were, copartners in business; that on that day the plaintiff sold his interest in the partnership business and stock to Hartford, for the sum of \$2,100, for which sum the notes in question were given, Hartford agreeing to pay all the debts of the firm, and executing a mortgage on the stock to secure the payment of said notes; that both parties agreed that these notes and the mortgage should be placed in the hands of the defendant; that Hartford should first pay the debts of the firm, and then pay these notes; that defendant was not to deliver any of these notes to the plaintiff, until the partnership debts were all paid; and that at the time of the commencement of this action the partnership debts were not all paid. The defendant denies that he has converted the notes to his own use, and avers that he now has, and ever since their delivery to him has had, the same in his possession, and that he now is, and at all times has been, ready and willing to deliver the same up to whoever may be lawfully entitled thereto.

"The answer then concludes as follows: 'And the defendant, further answering, charges the fact to be, that the said C. F. Hartford, who is not a party to this action, without any request or collusion on the part of this defendant, makes demand of this

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defendant, either that he deliver the said notes to him, or that defendant hold the same according to the condition of the agreement in reference to the same hereinbefore stated in this answer; that this defendant is ready and willing to deliver said notes to the clerk of this court, or to any person to whom the court may order the same to be delivered; that this defendant has no interest whatsoever in this controversy, but that the only parties in interest are the said plaintiff and the said C. F. Hartford. Wherefore the defendant asks that the complaint herein be dismissed as against the defendant; that this defendant may be discharged from all liability to the plaintiff, or any party interested in said notes, upon the defendant's depositing the same in court; that the said C. F. Hartford may be substituted as defendant herein, in place of this defendant; and that the defendant may have such other and further relief in the premises as may be just and proper.'

"To this answer the plaintiff filed a reply, denying all the allegations of the same, and especially denying the partnership alleged to have existed between the plaintiff and Hartford. The pleadings were all verified.

"When the cause came on for trial at the circuit, immediately after the jury were sworn, the defendant's counsel produced the notes, and said to the court: 'We have here in court the notes referred to in the complaint, and we wish at this time to deposit them with the clerk of this court, subject to the order and direction of the court;' and at the same time handed the notes to the clerk.

"There was a verdict in favor of the plaintiff for the full sum of \$2,100, and interest at ten per cent. from September 5, 1877. Before judgment, the defendant moved the court to reduce the verdict by the amount of the notes, and enter judgment for nominal damages in favor of the plaintiff, and that the notes be ordered to be delivered to the plaintiff. This motion was denied.

"The defendant also moved, on the minutes of the court, to

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set aside the verdict, on the grounds that it was contrary to law and against the evidence; that the court erred in its charge to the jury in the several matters excepted to by the defendant; and that the damages were excessive. This motion was also overruled."

Judgment was entered for the full amount of the verdict; and defendant appealed.

The cause was submitted for the appellant on briefs of *MacBride & Grundy* and *J. R. Sturdevant*. They contended, among other things, that defendant should have been permitted to return the property to the plaintiff in mitigation of damages, and, as no special damages had been proven, judgment should have been directed for a nominal amount. Byles on Bills, 6th Am. ed., p. 604, sec. 406; *Alsager v. Close*, 10 M. & W., 576; *Loosemore v. Radford*, 9 id., 657; *Whitten v. Fuller*, 2 W. Bl., 902; 3 Burr., 1364; *Earle v. Holderness*, 4 Bing., 462; *Thayer v. Manley*, 8 Hun, 550; 2 Hill, 132; *R. & W. Railroad Co. v. Bank of Middlebury*, 32 Vt., 639; *Yale v. Saunders*, 16 id., 243; *Hart v. Skinner*, id., 138; Cooley on Torts, 456.

For the respondent, there was a brief by *Ring & Youmans* and *Morrow & Masters*, and oral argument by *Mr. Ring*. They contended, among other things, 1. That it is questionable whether, in an action like this, the court has any power to order a return of the property in mitigation of damages. *Wheeler v. Pereles*, 43 Wis., 332, 338; *Reynolds v. Shuler*, 5 Cow., 323; *Livermore v. Northrup*, 44 N. Y., 107. 2. That if the court has power to make such an order in any case, it must be one in which it affirmatively appears from the undisputed evidence, that plaintiff will be in as favorable a situation after the return, as he would have been if the property had been delivered to him at the time of the demand; and that in this case, not only did that fact not affirmatively appear, but the contrary was apparent. Wherever the power to order a return of the property has been recognized in cases of this kind, it

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has been invariably affirmed that the making of the order rests primarily in the discretion of the court, and such discretion ought never to be exercised in favor of a defendant whose acts have been wanton or willful. *Hart v. Skinner*, 16 Vt., 138, opinion of REDFIELD, J., quoting from *Fisher v. Prince*, 3 Burr., 1363. It is well settled that the decision of the court resting on matters in its discretion will not be disturbed, except in cases of a manifest abuse of discretion. Defendant's wanton and willful denial of plaintiff's right, his complete repudiation of accountability and violation of duty to the plaintiff, make this a flagrant and aggravated case of conversion; and the evidence fully justifies the conclusion that there was a deliberate purpose and plan, on the part of the defendant and the maker of the notes, to defraud plaintiff out of the whole amount for which he sold his stock of goods.

TAYLOR, J. The evidence upon the trial was conflicting; and if the number of witnesses was conclusive as to the weight of the evidence, certainly the weight of the evidence was in favor of the theory of the defense, that the notes were to remain in the hands of the defendant, not, as set out in the answer, until the debts of the firm of Churchill & Co. were paid, but until the notes themselves were paid.

The plaintiff denies the alleged partnership, and denies that he agreed that either the firm debts or other debts owing by Hartford should be paid before the notes were paid. He claimed that he wanted the notes placed in the bank for collection, but that the defendant insisted they would be equally safe in his hands, and that he finally left them with him; that when the first became due, he called on defendant, and defendant said it had not been paid, and that there were other debts to be paid; that he afterwards called on the defendant and inquired where the notes were, and that *Welsh* abused him and ordered him off his premises. Soon after, and before the commencement of this action, he demanded the notes of the defendant, and the latter refused to give them up.

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The defendant and Hartford, the maker of the notes, and Hartford's brother, testified that the notes were delivered to the defendant with the express agreement that he was to hold them until they were paid by Hartford, and that it was also agreed that the debts owing by Churchill & Co., as well as the old mercantile debts owing by Hartford, were to be paid before these notes should be paid; and they and two or three other witnesses swear to the partnership existing between the plaintiff and Hartford. The evidence also shows that the chattel mortgage was indorsed at the time it was filed in the presence of the plaintiff, "subject to the order of *William Welsh*."

The evidence also shows that when the plaintiff demanded the notes of the defendant, he replied that he would give them up if both parties agreed to it, but he could not give them up unless both parties should agree thereto.

Notwithstanding the number of witnesses was in favor of the defendant, the jury found for the plaintiff; and this court cannot reverse the judgment, though we might be inclined to think the weight of evidence was in favor of the defendant.

We have noticed this subject of evidence, as bearing upon the question of the good faith of the defendant in refusing to surrender the notes when demanded, which is a matter of great importance in determining the question of the right of the defendant to surrender the notes after suit brought, in mitigation of damages.

As we have concluded that the circuit judge erred in not granting the motion of the defendant to reduce the verdict to merely nominal damages upon the offer of the defendant to surrender the notes to the plaintiff, it will be unnecessary to pass upon the other questions discussed upon the argument of this appeal.

It has been a well established rule in the courts of England for more than a century, that in actions of trover the court will, under certain circumstances, permit the defendant, after

suit brought, to bring the property claimed into court for the defendant, with the costs up to that time, and will then order a stay of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him unless he be able to show that he has been specially damaged by the conversion of the property by the defendant in addition to its value at the time of its return. Or the courts will, in a proper case, after verdict, upon a tender of the property, reduce the verdict to nominal damages.

This rule has been followed in Vermont to its full extent as practiced in the English courts, and has been recognized as a proper exercise of the power of the court in special cases in the courts of Maine, New York, Massachusetts, and other states. The cases in which this rule has been acted upon by the courts, are mostly cases for the conversion of bills, notes, bonds, and other contracts for the payment of money.

The rule was, perhaps, first definitely defined by the court of King's Bench, in 1762, in the case of *Fisher v. Prince*, 3 Burrow, 1364. In that case, Lord MANSFIELD and Justice WILMOT concurred in the following rule: "That where trover is brought for a specific chattel of an ascertained quantity and quality, and unattended with any circumstance that can enhance the damages above the real value, but that its real and ascertained value must be the sole measure of damages, then the specific thing demanded may be brought into court." (Justice WILMOT said "this was the more reasonable, as this action of trover comes in the place of the old action of detinue.") "Where there is an uncertainty either as to the quantity or quality of the thing demanded, or that there is any tort accompanying it, that may enhance the damages above the real value of the thing demanded, and there is no rule whereby to estimate the additional value, then it shall not be brought in. . . . It ought to be done; because at the trial, when the thing remains in the same condition, there generally is a rule 'to deliver it.' An estimated value is a

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precarious measure of justice compared with the specific thing."

Previous to this, the decisions of the courts had not been uniform, as will be seen by a reference to the cases of *Harding v. Wilkin*, Sayer's Reports, 120, 27 Geo. II., 1754; and *Calting v. Bowling*, East, 26 Geo. II.; Salk., 597. Since the decision in the case of *Fisher v. Prince*, the practice has been uniform in the English courts. The reasons for the rule, and the considerations which should govern courts in its application, are very briefly but most clearly stated by the learned chief justice in that case. *Pickering v. Truste*, 7 Term, 53; *Brinsden v. Austin*, Tidd's Pr., 571; *Tucker v. Wright*, 3 Bing., 601; *Earle v. Holderness*, 4 Bing., 462; *West v. Taunton*, 6 Bing., 404-408; *Whitten v. Fuller*, 2 W. Bl., 902; *Cooke v. Holgate*, Barnes, 281; *Royden v. Batty*, id., 284; *Moon v. Raphael*, L. J., N. S., C. P., vol. 5, p. 46; *Gibson v. Humphrey*, 1 Crompt. & Mees., 544; *Loosemore v. Radford*, 9 M. & Wels., 657, 659; *Alsager v. Close*, 10 M. & Wels., 576-584; *Cook v. Hartle*, 34 E. C. L., 528; Buller's Nisi Prius, 49 a, and notes. These cases show under what circumstances the rule established in *Fisher v. Prince* should be applied.

In the case of *R. R. Co. v. Bank of Middlebury*, 32 Vt., 639, which was an action of trover to recover for the conversion of certain railroad bonds, the court held, after a full discussion of the English authorities, that the rule of the English courts upon this subject was a just rule; and the defendant was permitted to bring the bonds into court, and, in the absence of any evidence showing any special damage beyond the value of the bonds, the court directed a verdict for the plaintiff for nominal damages.

In *Hart v. Skinner*, 16 Vt., 138, the rule was also discussed and recognized, but the right of the defendant to bring the property into court in that case was denied, because the defendant did not bring his case within the rule.

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In *Rogers v. Crombie*, 1 Greenl., 274, the rule was recognized, but it was held that it was discretionary with the judge trying the case, whether the defendant should be permitted to surrender the property in mitigation of the damages, and that the supreme court would not reverse the judgment of the trial court upon a question which rested in the discretion of that court.

In *Tracey v. Good*, 1 Clark (Pa.), 472, the court recognized the English rule, but refused to permit the return of the property under the facts of the case. The four cases last cited are the only ones we have been able to find, in which the English authorities upon this question have been considered and acted upon by the courts of this country; but that such right exists in proper cases, is recognized in the following cases: *Shotwell v. Wendover*, 1 Johns. R., 65; *Stevens v. Low*, 2 Hill, 132-134; *Thayer v. Manley*, 8 Hun, 550. The last case was an action by the maker of three promissory notes, to recover damages against the payee for obtaining said notes by fraudulent representations; and it was held that if the defendant returned the notes or destroyed them before the judgment, the plaintiff would only be entitled to judgment for nominal damages. See also Sedgwick on Damages (6th ed.), 614, and note; 2 Wheaton's Selw., 543.

This question was discussed by counsel in the case of *Wheeler v. Pereles*, 43 Wis., 332-340, but was not passed upon by the court. The case of *R. R. Co. v. Bank of Middlebury*, above cited, was referred to in the opinion of the court, with the remark that it was "not in point, and that nothing had been done there by the pledgee affecting the validity of the bonds pledged, and it might have been a proper exercise of power to permit the return of the bonds in mitigation of damages."

The question is an open one in this court; and we are disposed to adopt the rule of the English and Vermont courts, in a case like the one at bar, where the defendant holds the

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property as custodian for the parties in interest, and has never claimed any personal interest in the same, and, if guilty of conversion of the same at all, is simply guilty of a technical conversion through a mistake as to his duty as custodian of the same. It is not a case in which there has been a complete conversion of the property to the use of the defendant, and does not come within the reason of the rule of those cases which hold that, where there has been such a conversion, the defendant cannot mitigate the damages by an offer to return the property. The evidence, we think, clearly establishes the fact that the notes came to the possession of the defendant, either as the agent of the plaintiff solely, or as custodian for both the plaintiff and the maker. It also shows that the defendant made no claim to any ownership of the notes, or to any interest in them; that he offered to surrender them if both parties would agree to the surrender; that, immediately after the action was brought against him, he offered to bring the notes into court, and asked to be relieved of all further responsibility in relation to them; and we think it further shows that his refusal to surrender the notes to the plaintiff, upon his demand, was made in good faith, believing that he had no right to make such surrender without the consent of the maker, Hartford, and that, if he was guilty of any conversion of any of the notes to his own use, it was purely a legal and technical conversion.

We are also unable to perceive that the plaintiff suffered any special damage by the refusal of the defendant to deliver the notes on his demand. If any of the notes were due and payable to the plaintiff, and he desired to enforce the payment of them, the fact that they were in possession of the defendant, he not claiming any interest in them, could not hinder the plaintiff from proceeding to enforce their collection, either by action or upon the chattel mortgage.

We think great injustice will be done to the defendant if this judgment is permitted to stand. If any faith or credit is

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to be given to his own testimony, or to the testimony of the two Hartfords, he had at least the right to believe that it was not his duty to surrender the notes to the plaintiff; and although the jury found that he was mistaken in that belief, still, as he, immediately upon being sued, brought the notes into court and asked to be relieved from the further custody of the same, disclaimed all personal interest in them, and stated that his only reason for not delivering them to the plaintiff was, because the other party interested in them insisted that he had no right to deliver them to the plaintiff, it would seem most inequitable that he should be compelled to purchase them at their face value, with ten per cent. interest added, because of his mistaken belief in this particular.

The facts in this case, we think, present a much stronger case in favor of the defendant than the facts in the case of *R. R. Co. v. Bank of Middlebury*, above cited. In that case it was claimed by the plaintiffs, and so the jury found upon the trial, that the bonds held by the defendants were placed in their hands by the plaintiffs under the following circumstances: The plaintiffs were indebted to the defendants for two drafts of \$5,000 each, which were past due, and the defendants had commenced suit on the same. The plaintiffs applied to the defendants to discontinue, and renew the discount, and proposed to substitute new drafts for the old, and deposit with the defendants the bonds in question to hold as collateral security for such new drafts. The bonds were delivered to the defendants by the plaintiffs upon this understanding on the part of the plaintiffs; the new drafts were also sent to them, but the defendants refused to take the new drafts or surrender the old ones, and also refused to discontinue the suits upon the old drafts. The plaintiffs demanded a return of the bonds; the defendants refused to surrender the same; and thereupon the plaintiffs brought action against the defendants for a conversion of the bonds. To the plaintiffs' complaint the defendants at first pleaded the general issue,

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and the case was tried, after being continued from the September term, 1855, to the March term, 1857, and a verdict of \$9,000 was rendered in favor of the plaintiffs. This verdict was set aside by the defendants, and then, for the first time, the defendants offered to restore the bonds, and pay the costs already accrued; and asked a stay of all further proceedings on the part of the plaintiffs. The court ordered the plaintiffs' costs to be taxed, and that the defendants have leave to bring the bonds into court, together with the amount of the plaintiffs' costs, and that if the plaintiffs would accept the bonds and costs, all further proceedings should be stayed; but if the plaintiffs refused to accept that sum, and should proceed with the trial of the cause, the damages which should be recovered by the plaintiffs, should be subject to be reduced by the amount of the face value of the bonds, including interest; and in case the damages recovered by the plaintiffs should not, after being so reduced, amount to more than nominal damages, the plaintiffs should not recover costs against the defendants incurred subsequent to the delivery and payment into court of the bonds and costs, and the defendants should recover their costs incurred during the same term. The plaintiffs refused to accept the bonds and costs, and the cause was continued from term to term, and finally again tried in September, 1859. Upon this trial, the defendants conceded that, upon the whole evidence, the plaintiffs were entitled to recover, but that their right to recover was limited to the value of the bonds, and, these having been surrendered, they could, under the order of the court, recover only nominal damages. The court so decided, and the supreme court sustained the decision.

The excuse given by the defendants on the trial for not surrendering the bonds upon the demand of the plaintiffs, was, that they supposed the bonds were deposited with them as collateral security for their claims against the plaintiffs then overdue. And upon the trial they gave evidence tending to show

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that they acted in good faith in this respect, although they were mistaken as to the fact. All the supreme court say upon this question, in its decision, is this: "In the present case, it appears that the bonds sued for came lawfully into the possession of the defendants, *and were held under a claim of right*, in respect to which we do not discover any lack of good faith. So far, then, the case is not outside the rules of law."

In the case at bar, the defendant, who seeks to surrender the notes sued for, makes no personal claim of interest in the same; he confessedly holds them as custodian, without claim of title except to the possession. He claims and shows that the parties who placed them in his hands, disagree as to the purposes for which they were placed in his custody. When they are demanded of him by the plaintiff, he offers to surrender them if the parties who placed them in his hands will agree to whom they shall be surrendered. Upon being sued for their conversion, he promptly brings them into court, alleges that the conflicting claims of the parties render him unable to comply with the demand of the plaintiff, offers to put them into the custody of the court, and asks the court to make the other party in interest a party to the action, and that he be discharged from further litigation in the matter. When this is denied, no unreasonable delay is asked by the defendant, but the action is promptly brought to trial; when the jury have decided that he was mistaken as to the purposes for which they were placed in his hands, he immediately asks that he may be permitted to surrender them to the plaintiff in mitigation of damages. Upon the trial, he gives abundant evidence showing that the claim he made for not delivering the notes to the plaintiff was made in good faith.

If any defendant who is sued for a conversion of personal property, can be allowed to surrender the property after action brought, this defendant ought to be permitted to do so. As there is no claim made in the plaintiff's complaint that he has suffered any special damages by reason of defendant's refusal

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to deliver the notes when demanded, nor that there was any depreciation in the value of the notes between the time of their alleged conversion by the defendant and the commencement of this action, or the time of trial, the return of the notes to the plaintiff would have placed him in as good a position, so far as the evidence on the trial and the verdict of the jury discloses, as though there never had been any technical conversion by the defendant. No injustice would be done by their return to the plaintiff and permitting him to take judgment for nominal damages and costs; whereas great injustice will be done to the defendant by compelling him to pay presently, in cash, a very large sum of money for notes, many of which will not become due for a year or more, and whose real value is a matter of the greatest uncertainty, because he made an honest mistake as to his duty as custodian of them.

It is probable that the defendant did not bring his case, by his answer, within the letter of that part of sec. 22, ch. 122, R. S. 1858, now sec. 2610, R. S. 1878, which provides that "a defendant against whom an action is pending upon contract, or for specific real or personal property, may, at any time before answer, upon affidavit that a person not a party to the action, and without collusion with him, makes against him a demand for the same debt or property, upon due notice to such person and the adverse party, apply to the court for an order to substitute such person in his place, and discharge him from liability to either party, on his depositing in court the amount of the debt, or delivering the property or its face value to such person as the court may direct; and the court may, in its discretion, make the order." But he certainly brought the case within the spirit of the statute; and, had the plaintiff brought an action of replevin for the notes, instead of trover to recover their value, we are inclined to think the court would have been justified in granting his application to be discharged from the action on delivering the notes into court, and in substituting Hartford as the defendant in his stead. See *Schuyler v. Har- gous*, 3 Robt., 673; *McKay v. Dräper*, 27 N. Y., 256.

It is probable that the defendant might have relieved himself from the difficulty of his position by bringing an action in the nature of a bill of interpleader against the plaintiff and Hartford. That he did not bring such action, is no reason why he should not have the relief he asks in this, especially if the facts proved upon the trial would have justified him in bringing such action. By waiving his right to such action, he subjects himself to the costs of the present action, whereas, if he had brought and sustained his action of interpleader against the parties, he might have been entitled to recover his costs of that action upon bringing the notes into court.

But whether or not, upon the facts proved in this action, the defendant could have successfully sustained an action in the nature of a bill of interpleader against the plaintiff and Hartford, or whether he was entitled to any relief under the section of the statute above quoted, such facts, in our opinion, bring him within the spirit of both the relief provided by the statute and that furnished in an action of interpleader, and put him, therefore, in the strongest position for demanding of the court the relief he now asks for. His case presents the strongest equity for the application of the rule of the courts of England and of this country, above cited, which permits the return of the property in actions of trover, after suit brought, in mitigation of damages.

It is urged that if this rule is to be adopted at all, it must be discretionary with the court in which the action is tried, and, if that court refuses to allow the defendant to return the property in mitigation of damages, or to make any order upon the subject, this court cannot review and reverse the action of such court in a matter resting in its discretion.

Ordinarily this court will not reverse the action of the court below upon subjects which rest in its discretion. This court has, however, frequently held that the courts, in passing upon matters resting in discretion, must exercise a legal discretion, and if that discretion is abused, or if the court pro-

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ceeds upon a mistaken view of the law, their action will be reviewed and reversed here. *Crebler v. Eidelbush*, 24 Wis., 162; *McLaren v. Kehlor*, 22 Wis., 297; *Moll v. Semler*, 28 Wis., 589; *Rublee v. Tibbetts*, 26 Wis., 399; *Jones v. Evans*, 28 Wis., 168; *Van Doran v. Armstrong*, id., 236. As the motion of the defendant was a novel one in the courts of this state, we are inclined to think the learned circuit judge below denied the motion upon the supposition that he had no power to grant the relief asked for, under any circumstances, rather than upon the ground that the defendant had not made out a case, which, in his discretion, might entitle him to the relief asked, if, under any circumstances, he had the power to grant the same.

We are of the opinion that the power to grant the relief asked for by the defendant in this case is a power which the courts ought to exercise in proper cases for the promotion of justice and the prevention of harsh and unjust judgments, especially against parties standing in the position of mere custodians making no claim to any interest in the property, except to hold the same for the parties interested, and who, by reason of adverse claims made by such parties, decline to deliver to one of the parties upon demand, when in good faith such declination is based upon a belief that they have no right to make such delivery, and when it does not appear that any injury has been done to the demandant by such refusal, which will not be compensated by a return of the property. The establishment of this rule will be in harmony with the provisions of sec. 2610, R. S. 1878, above cited, with the long established jurisdiction of courts of equity in allowing bills of interpleader, and with the law of this state which authorizes the defendant, in cases of involuntary trespasses, to make a tender of damages before suit, the refusal of which puts the plaintiff in peril of the payment of costs, if in the end he does not recover greater damages than the amount tendered.

For these reasons we hold that the learned circuit judge should have granted the motion of the defendant, and that his

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refusal to do so is error, for which the judgment of the circuit court must be reversed.

By the Court. — The judgment of the circuit court is reversed, and the cause remanded with direction to grant the motion of the defendant to reduce the verdict to nominal damages upon his surrendering the notes to the plaintiff, and to enter judgment for the plaintiff for such nominal damages and the costs of the action.

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ENTRY OF JUDGMENT by clerk: VERIFICATION of complaint. (1) *When plaintiff may have judgment entered by clerk.* (2) *Verification of complaint by attorney.*

COSTS. (3) *When costs not recoverable.* (4) *When objection to allowing any costs may be taken.* (5) *Costs in supreme court.*

1. Where a plaintiff would otherwise be entitled to have judgment entered by the clerk for the amount named in the summons, without an assessment of damages, under section 27, ch. 132, R. S. 1858 (Tay. Stats., 1501, § 32), the fact that there has been a *demurrer* to the complaint, which has been overruled (without order either for judgment or for leave to answer over), will not affect plaintiff's right to have judgment so entered.
2. In an action by nonresident plaintiffs on book account for goods sold and delivered, a verification by the attorney on his belief states that "such belief is founded upon the admissions of the defendant that *said bill* is correct, and said amount due thereon, and upon communication had from plaintiffs in relation thereto." *Held*, that the words "said bill" (no "bill" being mentioned in the complaint) must be understood of said account, and that the statement of the grounds of belief is sufficient.
3. Under ch. 60, Laws of 1862 (Tay. Stats., 1531, § 55), with certain exceptions not affecting this case, no costs can be recovered by the plaintiff in actions on contract brought in the circuit court, which might have been brought in justice's court.
4. The objection that no costs could lawfully be taxed in a cause, is available on appeal from the taxation, though not taken before the taxing officer.
5. On affirming a judgment herein as to damages, and reversing it as to costs, this court directs, with respect to costs here, that judgment go against the respondents for the clerk's fees only, and that otherwise each party pay his own costs. R. S., sec. 2949.

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APPEAL from the Circuit Court for *Clark County*.

The action was commenced in the circuit court by personal service of the summons and complaint on the defendant. The complaint is the common count for goods sold and delivered by the plaintiffs to the defendant, to the value of \$162.18. It admits the payment thereon of \$72.18, and demands judgment for \$90, with interest and costs. The summons also specified \$90, and the interest thereon from a given date, as the amount for which judgment would be taken should the defendant fail to answer. The verification of the complaint is as follows:

"Clark County, ss.

"H. W. Sheldon, being duly sworn, says, that he is one of the attorneys for the plaintiffs in the foregoing entitled action, and that the foregoing complaint is true, as deponent verily believes; that such belief is founded upon the admissions of the defendant that said bill is correct and the said amount due thereon, and from communications had from said plaintiffs in relation thereto; that the reason this verification is not made by said plaintiffs, is because neither of them is within said county, and both reside long distances therefrom."

The defendant demurred to the complaint, as not stating a cause of action. The court overruled the demurrer, but failed to order judgment, or give leave to answer over. On an affidavit of the plaintiffs' attorney, stating the proceedings on the demurrer, that no answer had been served, and that more than twenty days had elapsed since the service of the summons and complaint, the clerk entered judgment for the plaintiffs for the amount of their claim, \$94.33, and for costs, taxed at \$22.15. At the ensuing term, defendant moved the court to set aside that part of the judgment which awarded costs against him; and, that motion being denied, he appealed from the judgment.

The cause was submitted on the brief of *MacBride &*

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Grundy for the appellant, and that of *James O'Neill* for the respondents.

LYON, J. It is conceded that the complaint states a cause of action, and the only grounds upon which the regularity of the judgment for damages is questioned, are these: *first*, that, although the demurrer had been overruled, no judgment could regularly be entered without the order of the court; and *second*, that the complaint is not properly verified, and hence that the clerk had no authority to enter the judgment without an assessment of damages, of which five days' notice should have been given to the defendant's attorney. R. S. 1858, ch. 132, sec. 27. No such notice was given.

When the judgment was entered, the demurrer had been disposed of, and was no impediment to the entry thereof. There was an appearance by the defendant, but no answer, and more than twenty days had elapsed after personal service of the summons and complaint. If, therefore, the complaint was duly verified, the case is within the provisions of R. S. 1858, ch. 132, sec. 27 (Tay. Stats., 1501, § 32), and the clerk was authorized to enter judgment against the defendant for the amount named in the summons; and this without notice, for in such a case an assessment of damages is not required. *Trumbull v. Peck*, 17 Wis., 265.

The verification is informal, yet we think it complies substantially with the requirements of the statute. R. S. 1858, ch. 125, sec. 19. The only objection urged against it is, that the attorney who made it states his grounds for believing that the complaint is true, to be "the admissions of the defendant that said *bill* is correct, and the said amount due thereon," when no bill is mentioned in the complaint. Obviously the bill referred to in the verification means the account for goods upon which the action was brought. The judgment for damages, therefore, is regular; and so the learned counsel must have thought when they moved to vacate that portion of it

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which awards costs, making no attack upon the award of damages.

The portion of the judgment which gives costs to the plaintiffs, cannot be upheld. With certain exceptions not affecting this case, the statute provides, that "in all actions on contracts, of which justices of the peace have jurisdiction, which shall hereafter be commenced in any court of record, no costs shall be recovered by the party plaintiff," etc. Laws of 1862, ch. 60 (Tay. Stats., 1531, § 55). This case is within that statute in every respect, and it was error to award costs to the plaintiffs.

The rule which requires a party to make objection before the taxing officer to any particular items in a bill of costs, in order to have the objection available on an appeal from the taxation, is not applicable to a case in which no costs can be lawfully taxed.

By the Court.—The judgment of the circuit court is affirmed as to the damages, and reversed as to the costs included therein.

We think this a proper case for the exercise of the discretion conferred upon us by R. S., sec. 2949, in respect to the costs in this court, when the judgment appealed from is affirmed in part and reversed in part; and we direct that judgment here go against the respondents for the clerk's fees alone. Beyond such fees, each party must pay his own costs.

URBANEK VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAIL-
WAY COMPANY.

REVERSAL OF JUDGMENT: (1) *For refusal of correct instructions.* (2) *Upon weight of evidence.* (3) *For admission of improper evidence.*

VERDICT: (4) *Special verdict held not evasive.* (5) *Jury may retire to further consider verdict.*

1. The refusal of special instructions correct in principle and applicable to the case, *held* no error where the same instructions were substantially given in the general charge.

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2. While in actions for injuries from trains at railroad crossings, testimony that the witnesses *did not hear* a signal given by blowing the whistle, is not, as a rule, so conclusive as testimony of the same number of witnesses that they *did* hear it, yet this rule may be greatly modified in a given case by the character and interest of the witnesses, their means of knowledge and manner of testifying, and other circumstances; and in this case there is no such preponderance of evidence against the special finding of the jury on that question, as will warrant a reversal of the judgment.
3. Where the objectionable portion of a witness's evidence was not responsive to any interrogatory, and there was no motion to exclude it from the jury, it is not ground of reversal.
4. To the questions, "Could the plaintiff have heard the whistle? If he had stopped his team, etc., could he have heard it?" the jury answered, "He might or might not." *Held*, that such an answer to *such* questions is not evasive.
5. It is not error to allow the jury, after coming in with a verdict, to retire for the purpose of further considering and perfecting it.

APPEAL from the Circuit Court for *La Crosse* County.

Action for injuries to the plaintiff's person and to his horses and wagon, from a train of cars on defendant's road. At the time of the accident, plaintiff was driving his team across said road upon a public highway, and the complaint alleges that the accident was caused by defendant's failure to give a reasonable and proper signal of the approach of the train.

It appeared from the evidence at the trial, that the highway in question is crossed by the Chicago & Northwestern Railway at a point about 341 feet south of defendant's crossing; and that plaintiff, driving northward, had crossed the track of the former road a few moments before the accident. It also appears that defendant's train was approaching from the west, and that its road crosses another highway at a point named Wolf's crossing, a half mile west of that at which the accident occurred.

There was a special verdict consisting of answers to eighteen interrogatories. These, with the answers as first given, were as follows:

- "1. Q. If plaintiff had used his eyes, could he, at any place

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on the highway, have seen the train as it approached the crossing? A. There is a point on the highway where the train could be seen, if the relative positions of plaintiff and train occurred at those points at the same time.

"2. Q. Did the plaintiff listen for the train? If so, where was he when he so listened? A. He did listen, as he approached the crossing.

"3. Q. Was there any place on the highway near the crossing of the C. & N. W. Railway, or between that crossing and the one where plaintiff was injured, from which defendant's train could have been seen by the plaintiff coming on their track, between the curve west of Wolf's and the crossing where the injury happened? A. There was a point near the C. & N. W. Railway, from which plaintiff might have seen defendant's cars, provided plaintiff was at said point when defendant's cars occupied a certain position east of Wolf's crossing.

"4. Q. If you answer "yes," where was it? A. Where the proper position was occupied by plaintiff and defendant's cars, as in the preceding answer.

"5. Q. Did the engine whistle at or near Wolf's crossing? If "yes," where, east or west of the crossing? A. Yes, west of Wolf's crossing.

"6. Q. If it did so whistle, could the plaintiff have heard it had he been listening and paying attention? A. Plaintiff did not hear it.

"7. Q. If plaintiff had stopped his team at any point between the crossing of the C. & N. W. Railway and that of the defendant, and had listened, could he have heard the train coming, and avoided the accident? A. He might or might not until too late to get out of the way, in case of such delay between the two roads.

"8. Q. Which came to the crossing first, the plaintiff or the defendant's engine? A. Nearly at the same time.

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"9. Q. Did the plaintiff collide with the defendant's engine?
A. No, but with the cars.

"10. Q. Did the defendant's engine collide with the plaintiff? A. No.

"11. Q. Did the defendant's train give a signal by whistling as it approached the crossing on which plaintiff was injured? A. No.

"12. Q. What was the weather on the day when the accident happened? A. Fair, with light wind.

"13. Q. For how long a distance west of this crossing did defendant's road run in a straight line? A. Nearly half a mile.

"14. Q. Did plaintiff know that the crossing was dangerous? A. Yes.

"15. Q. If plaintiff had used his ears, could he at any place on the highway have heard the train as it approached the crossing? A. No.

"16. Q. Did plaintiff exercise all necessary care and diligence in approaching the crossing? If you say "yes," explain what diligence and care he used. A. Yes, by listening and looking and careful driving.

"17. Q. Was defendant negligent in approaching the crossing? A. No.

"18. Q. If you say "yes," in what did such negligence consist? [No answer.]"

The jury also found for the plaintiff generally, and assessed his damages at \$2,745.

Plaintiff's counsel asked that the jury might be sent out to reconsider their answer to the 17th and 18th questions, on the ground that they had evidently misunderstood them; and the foreman stated that the jury understood the questions as referring to negligence on the plaintiff's part. The jury were accordingly permitted to retire and reconsider their verdict; and on their return answered the 17th question in the affirmative, and the 18th as follows: "By not whistling

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for the crossing before reaching it." On a further suggestion by plaintiff that the jury had misunderstood the 6th question, they were again sent out, against defendant's objection, and returned with the following answer to that question: "He might or might not have heard it." The verdict, amended in the particulars above stated, was accepted by the court against defendant's objection. Afterwards, during the same term, defendant moved for a new trial on the following grounds: That the verdict was contrary to the law and the evidence; that the first answer to the 6th question was equivocal, that the court erred in sending the jury out to make a new answer, and that the final answer was indefinite and equivocal; that the answer to the 7th question was indirect, equivocal and evasive; that the court erred in sending the jury out to reconsider their answers to the 17th and 18th questions; that the damages were excessive; and that the court erred in giving certain instructions, and in refusing those asked by the defendant. The motion for a new trial was denied, and judgment rendered for the plaintiff for the amount of damages assessed by the jury; from which the defendant appealed.

For the appellant, there was a brief by *Melbert B. Cary*, and oral argument by *J. C. Gregory*. They contended, 1. That the answers to the 6th, 7th and 8th questions were evasive, and that this was ground for reversal. *Davis v. Farmington*, 42 Wis., 425; *Carroll v. Bohan*, 43 id., 218. 2. That the answers affirming that plaintiff was in the exercise of proper care and diligence, were inconsistent with those made to the 9th and 10th questions, which find that he collided, not with the engine or tender, but with one of the cars. It is a sheer impossibility for a man, under the circumstances, to drive thus against the middle of a train, while in the exercise of ordinary care. And the answers to the 9th and 10th questions, being simply statements of an undisputed fact, touching one of the circumstances of the collision, must be accepted as true rather than the other answers, which are general conclu-

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sions based upon a great conflict of testimony and opinion. *Bach v. Parnely*, 35 Wis., 238; *Lemke v. Railway Co.*, 39 id., 449; *Haas v. Railway Co.*, 41 id., 44. 3. That the general verdict, and several of the answers of the special verdict, were contrary to the evidence. The jury, for example, found that defendant's negligence consisted in not whistling for the crossing before reaching it. All the testimony for the plaintiff upon that issue was purely negative, and there was abundant testimony both of defendant's employees (who were the persons most likely to know the fact), and of other and disinterested witnesses, showing that the whistle was blown for that crossing. The rule as to negative and affirmative evidence is well settled. *C. & A. Railroad Co. v. Gretzner*, 46 Ill., 75; *Culhane v. Railroad Co.*, 60 N. Y., 133. 4. That, from the facts and circumstances in evidence, the court should have said, as a matter of law, that plaintiff *could not have been* in the exercise of ordinary care at the time of the accident. *Reynolds v. Railroad Co.*, 58 N. Y., 248; *Mitchell v. Railroad Co.*, 64 id., 655; *Wilcox v. Railroad Co.*, 39 id., 358. 5. That the court erred in refusing to charge as requested by defendant, in respect to plaintiff's contributory negligence. 6. That the court erred in permitting a witness for plaintiff to testify in regard to an experience of his own in crossing defendant's track about a week after the accident.

C. L. Hood, for the respondent.

ORTON, J. This cause seems to have been very fully and ably tried, and the special findings of the jury cover all the material facts, and are consistent with their general verdict for the plaintiff, and there is no such preponderance of proof against them as would warrant this court in finding adversely to the jury on any material question of fact.

The special instructions asked by the respondent were given substantially in the general charge, and it was not error to refuse to give them in this special manner, although they

were correct in principle and applicable to the case, if they were so given substantially in the general charge. *Karasich v. Hasbrouck et al.*, 28 Wis., 569.

On the question whether any signal was given by the defendant, by blowing the whistle on the train approaching the crossing when the accident occurred, it is true, as a rule, that negative testimony, or the testimony of witnesses in the vicinity that they did *not* hear the whistle at that time and place, is not as conclusive as the testimony of the same number of witnesses that they *did* hear it; but this rule may be greatly modified in a given case, by circumstances — the character and interest of the witnesses, their means of knowledge and manner of testifying, and other matters forming the test of credibility, which the jury are presumed to have considered; and this court might do great injustice by applying this rule as an inflexible one, without these tests of credibility, and without reference to modifying circumstances.

In this case, the situation of the witnesses near the crossing, in full view of the advancing train, with their attention specially directed to the train, and to the signal or want of signal by blowing the whistle, might make their testimony as conclusive that such signal was *not* given, as the testimony of the same number of witnesses, whose situation and circumstances were less favorable to positive knowledge, that it *was* so given.

In respect to the testimony of Otto Botmer, detailing the circumstances of his own attempted crossing of the railroad at the same place when a train was approaching, about a week after this occurrence, that which was objectionable was not responsive to any question asked by the counsel of the plaintiff, and it is very likely that the court would have excluded it from the consideration of the jury upon request; but no such request was made, and it is now nominally in the case, not by the error of the court, for the court did not act, and was not called upon to act, upon the question; and not by the fault of the plaintiff, for he did not ask for such testimony; but by the

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neglect of the defendant in not asking for its exclusion. The witness had been asked to "state the circumstances," and the defendant's objection to the question had been sustained by the court, and then the witness stated the circumstances improperly and of his own accord, while answering questions which, though objected to, were clearly proper, but which did not call for any such objectionable evidence.

The jury were substantially informed by the ruling of the court upon the question, that these circumstances were improper evidence, and that they should not be considered by them; and it is not to be presumed that this evidence so given had any weight with the jury.

Objection is taken to the special finding, or want of finding, of the jury, in response to the questions, "Could the plaintiff have heard the whistle?" "If he had stopped his team, etc., could he have heard the whistle?" The answer is, "He might or might not."

It requires no argument to show that it was impossible for the jury to give direct and positive answers to these questions. The most the jury could do, would be to give their opinion, and their opinion was not asked. The plaintiff's physical ability to hear the sound of the whistle from the place he occupied, depended upon many facts and conditions, and these facts and conditions would have been the proper subjects of their finding if they had been proved; but an opinion founded upon no proof of all the facts and conditions required for the basis of any opinion, would be of no value; and if founded upon all such facts and conditions when actually proved or known, it is a mere *opinion* at best, and no such *fact* as could be the subject of a special finding.

The answer of the jury was, substantially, that they did not know whether the plaintiff could have heard the sound of the whistle, situated as he was at the time, and under all the possible circumstances of his situation. The answer is not evasive, so much as an expression of inability to answer the question at all.

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Objection to such a question, asking for an impossible answer, would have been more tenable.

Exception is taken to permitting the jury to amend their verdict. It is not error to allow the jury to again retire to consider and perfect their verdict. *Hugh v. Johnson*, 18 Wis., 72.

Some other exceptions appear in the record, but of no substantial importance as affecting the result, and which were not pressed on the argument.

By the Court.—The judgment of the circuit court is affirmed, with costs.

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COURT AND JURY. (1) *Credit due testimony, for the jury.*

PROMISSORY NOTE: SURETY: EXTENSION OF TIME. (2) *When surety discharged by agreement to extend time.* (3) *Parol proof of usurious agreement to extend time.* (4) *When agreement to pay usury no consideration.*

REVERSAL OF JUDGMENT: (5) *For rejection of evidence.*

1. The question of the credit due testimony is for the jury; and where a witness has distinctly testified to facts which would sustain the verdict, a judgment on the verdict will not be reversed on the ground that such testimony was contradicted by that of several other witnesses.
2. One who has signed a note as surety, will not be discharged by an *invalid* agreement to extend the time of payment to his principal; nor by a valid agreement made by a holder without notice that he is a surety.
3. An usurious agreement for extension of time of payment may be shown by parol, in a proper case.
4. Where one issue was, whether time of payment had been extended on the note in suit, the jury were instructed that an agreement to pay a bonus or interest in excess of ten per cent., being illegal, would not constitute a sufficient consideration. *Held*, that this must be understood of a mere *executory* agreement, and was correct. *Meiswinkle v. Jung*, 30 Wis., 361.
5. The rejection of proper evidence is not ground of reversal, where the witness was afterwards permitted to testify fully upon the subject.

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APPEAL from the Circuit Court for *La Crosse* County.

Action on two promissory notes, for \$1,073 and \$1,500 respectively, both dated December 5, 1871, and payable eight months after date, in gold, with interest in gold at ten per cent. per annum. The complaint alleges demand at maturity and on subsequent occasions; and that at the maturity of the note gold was worth a premium of about fifteen per cent., while at the commencement of the action the premium was only one per cent. Judgment is demanded for \$2,733.95, with interest at ten per cent. from the date of the notes. The defendant *Polleys* answered, admitting the execution of the notes, but denying that they were then due and payable, or that either of the defendants was indebted upon them except as afterwards stated in the answer. "By way of counterclaim and defense," the answer then alleges that on the day when said notes were payable by their terms, defendant tendered to plaintiff the full amount of money due upon them; that plaintiff declined to receive the same, stating that he had no use for any part of the money and contracted to reloan the money to defendant for one year in consideration that defendant would pay plaintiff the same rate of interest named in the notes, and would employ him for the then ensuing year "at the wages and sum of \$700;" that the time of payment of said notes was thus extended from August 8, 1872, to August 8, 1873; that about the time the notes became due, defendant, at plaintiff's request and as a consideration of the extension of time of payment of said notes, entered into an agreement with the plaintiff, which was indorsed upon each of the notes, whereby defendant agreed to pay interest upon the interest upon said notes after such interest became due; and that defendant "did employ plaintiff one year from August 8, 1872, at the wages of \$700 per year, and paid him in full for said services, as agreed for the consideration aforesaid." It is further alleged that said notes were given for a loan of money from plaintiff to defendant; and that the defendant *Weston* was a surety on each of said notes, and re-

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ceived no part of the consideration for which the same were given, as was well known to plaintiff before the loaning of the money or the delivery of the notes. It is further alleged, in substance, that on the 8th of August, 1873, plaintiff proposed to reloan the money then due to defendant for three years from that date, upon defendant's employing plaintiff during that time at the rate of \$600 per year, and paying him \$50 per year *bonus*; that defendant assented to the proposition, and the time for payment of said notes was thereby extended for said term of three years, and defendant employed said plaintiff and paid him under said agreement \$150 for such extension of time; and that the defendant *Weston* had no notice or knowledge of such extension of time and never assented thereto. It is further alleged that, on the 8th of August, 1876, plaintiff and said defendant *Polleys* had a settlement of some other dealings between them; that at that time plaintiff proposed to loan to said defendant the money then due upon said notes, for one year from that date, and release the defendant *Weston* from all liability upon said notes, on condition that defendant should continue plaintiff in his employ at the same wages as during the three previous years, and pay him \$25 upon each of said notes, and give him certain mortgage securities; that defendant assented to said proposition, and in pursuance of said agreement paid plaintiff \$50 in money, employed him as agreed, and as soon thereafter as practicable, to wit, September 16, 1876, executed and delivered to him the mortgage securities aforesaid; that the time of payment of said notes was thereby extended for one year from August 8, 1876, and *Weston* was discharged from all liability upon said notes; and that *Weston* had no notice of the last mentioned contract, and took no part therein. There are similar averments of a further extension of time from August 8, 1877, to August 8, 1878, upon an executed consideration, and without the knowledge or assent of *Weston*. Upon these averments, the answer prays that said last mentioned contract for the extension of payment to August 8,

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1878, may be specifically enforced; that the payments made by said defendant to plaintiff on the notes be credited to defendant thereon; that plaintiff be perpetually enjoined from prosecuting this or any action upon said notes until after August 8, 1878; that the defendant *Weston* be discharged from all liability upon the notes; and that said contract for his release be specifically enforced, etc.

The defendant *Weston* answered separately, setting up substantially the same facts as are alleged in the foregoing answer.

The alleged errors in the rulings of the court upon evidence and in its instructions to the jury, will sufficiently appear from the opinion.

Plaintiff had a verdict against both defendants for \$4,000.93; a new trial was denied; and from a judgment on the verdict, both defendants appealed.

For the appellants, there was a brief by *M. P. Wing* and *G. C. Prentiss*, their attorneys, with *Cameron, Losey & Bunn*, of counsel for *Weston*, and oral argument by *Chas. W. Bunn*. They contended, among other things, 1. That parol proof was admissible to show that *Weston* was merely a surety. *Riley v. Gregg*, 16 Wis., 671; *Austin v. Boyd*, 24 Pick., 64; *Harris v. Brooks*, 21 id., 195; *Carpenter v. King*, 9 Met., 511; 2 Am. L. C., 279, 289-303; *McGee v. Prouty*, 9 Met., 547; *Horne v. Bodwell*, 5 Gray, 457; *Grafton Bank v. Kent*, 4 N. H., 221; *Grafton Bank v. Woodward*, 5 id., 99; *Wheat v. Kendall*, 6 id., 504; *Davies v. Barrington*, 30 id., 517; *Lime Rock Bank v. Mallet*, 42 Me., 349; *S. C.*, 34 Me., 547; *Mariner's Bank v. Abbott*, 28 id., 280; *Wilson's Adm'r v. Green*, 25 Vt., 450; *Bank of St. Albans v. Smith*, 30 id., 148; *Artcher v. Douglass*, 5 Denio, 511; 18 Pa. St., 207; *Ap- gar v. Hiler*, 24 N. J. Law, 812; *Bank of Steubenville v. Leavitt*, 5 Hammond, 207; *Bank of Steubenville v. Hoge*, 6 id., 17; *Core v. Wilson*, 40 Ind., 204; *Brown v. Haggerty*, 26 Ill., 469; *Ward v. Stout*, 32 id., 399, 410; *Piper v. Newcomer*, 25 Iowa, 221; *Garrett v. Ferguson*, 9 Mo., 125; *Coats v.*

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Swindle, 55 id., 31; *Rose v. Williams*, 5 Kans., 493; *Higdon v. Bailey*, 26 Ga., 426; *Branch Bank v. James*, 9 Ala., 949; *Davis v. Mikell*, 1 Freeman Ch. (Miss.), 548; *Roberts v. Jenkins*, 19 La., 453; *Bell v. Banks*, 3 Scott's N. R., 503; *Stone v. Compton*, 5 Bing., N. C., 142; *Petty v. Cooke*, L. R., 6 Q. B., 790; *Oriental Co. v. Overend*, L. R., 7 Ch. App., 142, affirmed in House of Lords, 31 Law Times, N. S., 322; *Oakeley v. Pasheller*, 4 Cl. & Fin., 207; *Wilson v. Lloyd*, L. R., 16 Eq. Cas., 60; *Pooley v. Harrandine*, 7 El. & Bl., 433; *Greenough v. McClelland*, 2 El. & El., 424; Brandt on Suretyship, §§ 17, 18. 2. That where time has been given to the principal without consent of the surety, the mere presumptive injury to the latter is sufficient to discharge him, and no proof of actual injury is required. *Rees v. Berrington*, 2 Ves. Jr., 540, and cases cited in notes to 2 Am. L. C. (3d ed.), at p. 312. 3. That the court erred in holding that the evidence offered on that subject did not tend to show a valid extension of time on the note. The record presents for decision the question whether an agreement by the creditor to extend time of payment to the principal for a sum of money in excess of the highest legal rate, which sum is actually paid and retained by the creditor for such extension until under the statute it cannot be recovered back or offset, will release the surety. In *Riley v. Gregg*, 16 Wis., 666, it was held that usurious agreements are void only at the option of the borrower and those in privity with him; and that the lender is precluded, upon general principles of public policy, from setting up the usury to defeat any rights which the other party, or those in legal privity with him, may claim by virtue of the contract. In *Meiswinkle v. Jung*, 30 Wis., 361, it was merely decided that the usurious agreement, so long as it remained *executory* as to both parties, was void as to both. See the note of Chief Justice DIXON to *Riley v. Gregg*, 16 Wis., 672, in V. & B.'s ed. Both the above cases were decided under ch. 160, Laws of 1859. Sec. 4 of that act provided that where any greater rate than

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ten per cent. was reserved, the whole contract was *void*; and sec. 8 declared that, on the fact appearing that any contract had been made in violation of the act, the court should declare it *void*. Ch. 93 of 1871 repeals these provisions, and enacts that usurious agreements shall be *valid* and effectual to secure the repayment of the principal sum loaned, but that no interest shall be recovered on such securities, or on the money loaned. Whatever criticism may be made on the language used in *Riley v. Gregg*, under the act of 1859 (*Austin v. Burgess*, 36 Wis., 192), it certainly lays down good law under the act of 1871. In this case the usurious consideration was paid, and the time for recovery of the same by the person paying it had passed before the commencement of this action; and the case is ruled by *Riley v. Gregg*. Moreover, the weight of reason and authority is in support of that decision. 1 Parsons on N. & B., 240. The contrary doctrine seems to rest on *Vilas v. Jones*, 1 Coms., 286. That was decided on the ground that the New York statutes made all usurious contracts *void*. See *Vilas v. Jones*, 10 Paige, 79; *Miller v. McCan*, 7 id., 451; *Billington v. Wagner*, 33 N. Y., 31; *La Farge v. Herter*, 5 Seld., 241; *S. C.*, 4 Barb., 346. The two latter cases are irreconcilable with *Vilas v. Jones*. In both an extension had been given to the principal on a usurious consideration in fact *paid*, and the creditor, before the extended time expired, brought an action against both principal and surety, and the court, relying on *Miller v. Kerr*, 1 Bailey, 4, held that the extension was valid as against the creditor, and that he could not sue before it expired. *Church v. Maloy*, 70 N. Y., 63, is distinguishable from this on two grounds: first, that the New York statute (as we suppose) makes a usurious contract *void*; second, that the suit was brought before the expiration of the time limited for recovering back the usury. As directly sustaining *Riley v. Gregg*, see *Kenningham v. Bedford*, 1 B. Mon., 325; *Duncan v. Reed*, 8 id., 382; *Kyle v. Bostick*, 10 Ala., 589; *Austin v. Dorwin*, 21 Vt., 38. See also Brandt on Suretyship,

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§ 309, citing further, *Turrill v. Boynton*, 23 Vt., 142; *Scott v. Saffold*, 37 Ga., 384; *Cox v. Railroad Company*, 44 Ala., 611; *Scott v. Harris*, 76 N. C., 205; *Armistead v. Ward*, 2 Patton, Jr., and H., 504. And to the point that a usurious agreement to extend discharges the surety where the law does not pronounce the usurious contract void, but merely subjects the lender to certain penalties, see *McComb v. Kittridge*, 14 Ohio, 351; *Harbert v. Dumont*, 3 Ind., 348; *Cross v. Wood*, 30 id., 378; *White v. Whitney*, 51 id., 124; *Redman v. Deputy*, 26 id., 338; *Calvin v. Wiggam*, 27 id., 489; *Montague v. Mitchell*, 28 Ill., 481; *Kennedy v. Evans*, 31 id., 258; *Wittmer v. Ellison*, 72 id., 302; *Danforth v. Semple*, 73 id., 172; *Myers v. Bank of Fairbury*, 78 id., 258; *Kelley v. Gillaspie*, 12 Iowa, 57. In *Burgess v. Dewey*, 33 Vt., 618, and some other cases, it is held that the payment of the usury must be made *within the time of the extension*, to make the consideration good. The evidence in this case shows that the bonus of \$150 for an extension for three years from August 8, 1873, was paid July 4, 1876, or more than thirty days before the extension expired. An extension for a very brief time, as for one day, has the same effect as one for a long time. *Fellows v. Prentiss*, 3 Denio, 512.

For the respondent, there were briefs by *Howe & Tourtelotte*, his attorneys, with *J. M. Morrow*, of counsel, and oral argument by *Wm. E. Howe*. They contended, among other things, 1. That, as *Weston* appears on the face of the notes as joint maker, he could not show by oral evidence that he was a mere surety, as that would be an attempt to vary by parol the terms of the written contract. *Charles v. Denis*, 42 Wis., 56; *Eaton v. McMahon*, id., 484; *Harris v. Newell*, id., 687; *Prescott Bank v. Caverley*, 7 Gray, 217; *Wright v. Morse*, 9 id., 337; *Brown v. Butler*, 99 Mass., 179-80; *Way v. Butterworth*, 108 id., 509, 513; *Allen v. Brown*, 124 id., 77; *Bull v. Allen*, 19 Conn., 101; *Campbell v. Tate*, 7 Lans., 370; *Brown v. Curtiss*, 2 N. Y., 225; *Hendrickson v. Hutchinson*,

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5 Dutch., 180; *Stroop v. McKenzie*, 38 Tex., 132; *Shriver v. Lovejoy*, 32 Cal., 574; *Sprigg v. Bank of Mt. Pleasant*, 10 Pet., 265; *Ball v. Gilson*, 7 Up. Canada, C. P., 531; *Strong v. Foster*, 84 E. C. L., 201; *Manley v. Boycot*, 2 El. & Bl., 46; 1 Parsons on N. & B., 233; 2 Daniel on Neg. Inst., §§ 1335-8, and notes; Story on Bills, §§ 253, 425, 432, 435; Byles on Bills, 3d Am. ed., *192. 2. That the surety is not discharged by an extension of time to the principal where it does not appear that he was injured by such extension, or at least where the evidence shows affirmatively, as here, that he was not injured. *Gardner v. Van Norstrand*, 13 Wis., 543; *Barber v. Kilbourn*, 16 id., 485, 489-90. 3. That the agreement to extend for three years, of which evidence was offered and rejected, was an *executory* agreement, and that that part of the charge upon the subject of such agreements, which was excepted to, related clearly to *executory* agreements, and was correct. *Meiswinkle v. Jung*, 30 Wis., 361; *Vilas v. Jones*, 1 N. Y., 286 and 288; *Church v. Maloy*, 70 id., 63; *Abel v. Alexander*, 45 Ind., 523 (15 Am. Rep., 270, 275, 277); *Ives v. Bosley*, 35 Md., 262 (8 Am. R., 411, 415, 416); *Burgess v. Dewey*, 33 Vt., 618; *Howell v. Sevier*, 4 Leg. Rep. (Tenn.), 195; *S. C.*, 7 Cent. L. J., 475; *Shaw v. Binkard*, 10 Ind., 227, per HANNA, J.; Brandt on S. & G., §§ 309, 310, and cases there cited. From August 8, 1873, to July 4, 1876, the alleged contract of extension was wholly *executory*, and, being forbidden by law, could not have been enforced by either party. During the last thirty days of the three years, after the payment of the money, matters were in effect wholly unchanged; for the \$150 paid as *bonus* could have been recovered back at any time during that thirty days. There was therefore not a single moment during all of the three years, when plaintiff could have been compelled to delay the recovery of his money by suit, or when *Weston*, if a surety, could not have resorted to his remedies as such. *Harris v. Newell*, 42 Wis., 691; *Meiswinkle v. Jung* and *Shaw v. Binkard*, *supra*; *Goodhus v. Palmer*, 13 Ind., 457; *Jenness v. Cutler*, 12 Kans., 500.

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COLE, J. It is doubtful whether some of the questions which were so fully and ably discussed by counsel on the argument, are fairly presented by this record. For instance, whether or not parol proof was admissible to show that *Weston* signed the notes in suit as surety, is out of the case, for the reason that the answers alleged that he executed the notes as surety, and testimony was given on the trial, without objection, to show his relation to the notes. That question may therefore be dismissed without further comment.

We are unable to agree with the learned counsel for the defendants in the position that there is no evidence in the case worthy of credit, to support the verdict. To our minds there is sufficient evidence to sustain it, even as against the defendant *Weston*. In saying this, we do not mean that there is what is called in the books a mere *scintilla* of evidence in favor of the conclusion reached by the jury, but that there was evidence upon which a jury might proceed to find as they did, within the reasonable rule laid down on this subject in *Toomey v. L. & S. C. Railway Co.*, 3 C. B., N. S., 150; *Jewell v. Parr*, 13 C. B., 909; *Improvement Co. v. Munson*, 14 Wall., 448. If the jury were satisfied that the plaintiff told the truth in regard to the transactions about which he testified, they might well have concluded, either that *Weston* was not a surety, but one of the principal makers of the notes, or, if he was a surety, that the plaintiff had no notice of that fact when the notes were executed and delivered; or, finding that *Weston* was a surety, and known to be such by the plaintiff when the notes were given, then that there was no valid agreement shown to extend the time of payment, so as to exonerate him from liability. The jury might have been satisfied that either one of the above states of facts was clearly established, and consequently found as they did. It is true that there was testimony which directly and positively, in some material points, contradicted this testimony of the plaintiff. But the credibility and weight of the testimony was a matter exclusively for the jury,

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and we cannot disturb the verdict because we think they reached a wrong conclusion upon it. We have no right to say the jury erred in believing the statements of the plaintiff rather than the opposing statements. It is enough that there was evidence from which the jury might reasonably and properly have found that either one of the above propositions of fact was true.

It is further insisted that the court below erred in excluding the evidence offered to prove that the premium on gold advanced between the making of the notes and the time they fell due. It is said that the proposed testimony had a tendency to discredit the statements of the plaintiff in regard to conversations which he testified he had with *Polleys* when the notes became due in 1872, and therefore should have been admitted. We are unable to see that the proposed testimony could have any such effect or tendency. It seems to be entirely immaterial and irrelevant for any purpose. It was not limited to the time when the notes became due, which was the time the plaintiff said he told *Polleys* gold was falling, and he was losing on the premium.

In regard to the last defense set up in the answers, the court in effect charged that, if an agreement was entered into between the parties upon a sufficient consideration, whereby the time of payment upon the notes was extended to August 8, 1878, this would defeat the action as to both defendants. The jury were further told, that, if the proof showed that *Weston* was a surety merely, to the knowledge of the plaintiff, then any agreement for an extension of the time of payment made with the principal debtor upon a good consideration, and without the consent of the surety, would release the surety from all liability on the notes. As to what consideration was necessary to support an agreement to extend the time of payment, the court also charged that an agreement to pay a bonus or interest in excess of ten per cent., being illegal, would not constitute a sufficient consideration; but that an

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agreement to pay interest upon interest already accrued and due, or to pay it upon interest to become due, after the time it became due, not being illegal, would be a good consideration for an extension of the time of payment. And this brings us to the third ground assigned for reversing the judgment, which is the error in the ruling of the circuit court in rejecting certain evidence, and in charging the jury that an agreement to pay a bonus or interest in excess of ten per cent. per annum would be illegal and would not support an agreement to extend the time of payment.

As to the first point, it is necessary to observe that *Polleys* was examined on the trial, and had stated, in substance, that when the year came around in August, 1873, plaintiff reloaned the money to him for three years, upon the consideration of \$150, and also that he was to give the plaintiff employment any time he wanted to work during that time. He was then asked this question: "At what rate?" This question was objected to, for the reason that the agreement was usurious and void, and because it was an attempt to vary the terms of a written contract by parol evidence. This objection was sustained. It is not clear whether the question referred to the wages to be paid plaintiff for his work, or to the rate of interest to be paid on the notes. Assuming, however, that it related to the latter, we suppose it too plain for argument that the defendant might prove by parol the usurious agreement, if one was made. Parties do not generally reduce their usurious contracts to writing, and unless the real agreement could be shown by parol, the statute would practically be evaded in all cases. It is said by plaintiff's counsel, that the proposed evidence was inadmissible under the allegations of the answer. But this is a mistake; for *Polleys*, in his answer, states that plaintiff proposed to loan him the money for three years from the eighth of August, 1873, upon condition that he would pay a bonus of \$50 a year; that he accepted the proposition; that the time of payment was extended; and that he paid under

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the agreement \$150 for the extension. But we think the true answer to be given to this exception is, that the defendant could not have been prejudiced by the ruling, because the witness subsequently testified fully as to all the agreements set up in his answer to extend the time of payment, and the consideration for these extensions, especially about the one made in August, 1873. And he leaves the matter in much doubt, whether in fact any agreement to extend the time of payment was at that time entered into. He says that he paid the plaintiff \$150 about the fourth of July, 1876; that he understood he was paying this as a bonus on the money which he agreed to pay each year; that previous to this time the plaintiff came to him and said he would not take money under that contract (evidently referring to the memorandum on the notes that, if interest was not paid annually, the interest was to draw interest, which memorandum *Polleys* says he wrote two or three months after the notes were given), because he, the plaintiff, had been told that it made the note worthless. *Polleys* replied it made no difference to him, and the plaintiff wanted it to be considered as a bonus instead of compound interest. The testimony of *Polleys*, as contained in the bill of exceptions, is vague and very unsatisfactory. He nowhere positively states that there was any such agreement made as is set out in his answer, and we are inclined to think none such was made. At all events, the error in excluding the question referred to above, in the first instance, was cured by the subsequent examination of the witness upon the same subject.

The point made upon the charge we deem untenable. The proposition contained in the charge is, that an executory usurious agreement to extend the time of payment, being illegal, was not a good consideration in law for any agreement whatever, and did not release the surety. Such was the decision of this court in *Meiswinkle v. Jung*, 30 Wis., 361, which we think lays down the correct rule on the subject. See also *Riley v. Gregg*, 16 Wis., 667, and note of C. J. Dixon at the end of the case.

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This case was argued upon the assumption that the court held that an usurious agreement which had been executed by the payment of the usury, on the part of the borrower, would not support such an agreement to extend the time of payment; but it is very obvious that this is not the meaning of the charge. The court was speaking of *an agreement to pay and receive* more than legal interest. Whether the same rule would obtain in case of an executed agreement, is a question not passed upon in the charge, and not presented to this court for decision.

By the Court.—The judgment of the circuit court is affirmed.

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APPEAL FROM PROBATE COURT: NOTICE: BOND. (1, 2) *Form of order for service of notice of appeal.* (3) *Waiver of such service.* (4) *Service in fact supports jurisdiction of circuit court.* (5) *Serving notice on, and filing it with, county judge.* (6) *Appeal bond executed in firm name.* (7) *To whom bond should run.* (8) *May be good though not strictly conformed to statute.* (9) *Case stated: bond held good.*

1. An order for service of notice of an appeal from the county court to the circuit court, directing in terms that such service be "upon the adverse party," without naming him, followed by service upon the proper party, is good (*Nelson v. Clongland*, 15 Wis., 392); and where the administrators of an estate are the adverse parties, an order for service upon certain persons by name, followed by service upon them, would also be good, if such persons were in fact the administrators.
2. Whether, where there are several administrators, an order for service upon *one* of them only by name, would be sufficient, is not here determined.
3. Where there has been no sufficient service of notice of appeal, the appearance of the adverse parties in the circuit court, and their motion to dismiss the appeal based in part on other than jurisdictional grounds, is a *waiver* of all defects in the service.
4. The fact that "there was no *evidence* that notice of the appeal was given," at the time when a motion to dismiss the appeal was made, is not jurisdictional; and its assignment as ground of dismissal is an implied admission that the notice was in fact served.

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5. An appeal from an order of the county court disallowing a claim against an estate should not be dismissed on the ground that no notice of the appeal has been served on the county judge or filed in his office; the statute not requiring any such service or filing.
6. Where, on appeal from the disallowance of a claim of partners in their firm name, the appeal bond is executed in the firm name, the presumption, in the absence of all proof, is, that it was so executed as to bind both partners, and the mode of execution is approved.
7. Such a bond running to "A., B. and C., administrators," etc., satisfies the statute requiring it to run to the adverse parties, where the persons named were in fact the administrators; and although the words "administrators," etc., might in some contracts be held mere *descriptio personae*, they could not be so held in an action upon such a bond.
8. If the bond on appeal from the probate court substantially covers the provisions of the statute, and secures to the appellee all that the law designed for him, it is sufficient, although it does not follow the language of the statute.
9. The condition of the bond required by the statute is, that appellant "shall prosecute his appeal to effect, and pay all damages and costs which may be awarded against him." R. S. 1858, ch. 101, sec. 21. The condition of the bond here in question is, that appellants will "pay all damages and costs that may be awarded against them, in case they shall fail to obtain a reversal of the decision (describing it), and that they will diligently prosecute such appeal, without any fraud or other delay." *Held*, sufficient.

APPEAL from the Circuit Court for *Fond du Lac* County.

A. C. Kasson and F. W. Noyes filed, in the county court of Fond du Lac county, a claim against the estate of Bocker, for \$619.88. No commissioners having been appointed to determine claims against said estate, the county judge considered and disallowed the claim in question. An appeal was allowed and taken from this decision, a bond given, and the papers certified to the circuit court. Defendant appeared in that court, and moved to dismiss the appeal (stating sixteen reasons for such dismissal), and for such other or further relief as might be just, and for the costs of the motion; and, from an order denying such motion, it appealed to this court.

Certain facts are more fully stated in the opinion.

For the appellant, there were briefs by *Giffin & Williams*, and oral argument by *Mr. Giffin*.

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For the respondents, there was a brief by *Hauser & Colman*, and oral argument by *Mr. Colman*.

TAYLOR, J. The reasons urged in this court by the learned counsel for the appellant, for the reversal of the order of the circuit court, are substantially the following: *first*, that there was no proper application to the county court for an appeal; *second*, that no notice of the appeal had been served on the adverse party, or upon the county judge, and none filed in the office of the county judge; *third*, that the county judge made no order directing the manner in which the appeal should be served; *fourth*, that there was no evidence that the notice of appeal had been given to the adverse party; *fifth*, that the bond given on such appeal was insufficient, and not in conformity to the requirements of the statute.

The record of the proceedings returned and filed in the circuit court by the county judge, duly certified by him, shows that the respondents presented a claim against the appellant estate for the sum of \$619.88; that the county court made an order disallowing the whole of such claim on the 15th day of April, 1878; that on the 12th day of June, 1878, the claimants filed with the judge of the county court a paper, of which the following is a copy:

"In Probate Court, Fond du Lac County. In the matter of the claim of *A. C. Kasson and F. W. Noyes v. The Estate of P. Bocker*.

"This cause having come on for hearing, and the claim of the claimants having been disallowed, by decision of the county judge acting as commissioner, on the 15th day of April, 1878, these claimants, being aggrieved by such decision, hereby petition and make application for the right of appeal herein.

"Dated June 10, 1878.

(Signed) "A. C. KASSON and F. W. NOYES, Claimants.

"By HAUSER & COLMAN, their attorneys."

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On the back of this paper was the following indorsement:

"Filed, and appeal allowed, this 12th day of June, A. D. 1873. GEO. PERKINS, County Judge."

On the same day, the county judge made the following order:

"In the matter of the claim of *A. C. Kasson* and *F. W. Noyes v. The Estate of Philip Brocker*.

"The claimants herein having made an application for the right of appeal from the decision of the county court sitting as commissioners, and having filed their bonds as required by statute; it is

"*Ordered*, that said appeal be allowed, and said bond be approved, and that notice of such appeal and of the hearing of the same be served on Rudolph Ebert, one of the administrators of said estate of P. Brocker, at least twelve days before the next term of the circuit court.

"Dated June 12, 1878.

"By the Court,

"GEO. PERKINS, County Judge."

This record shows that the persons appealing from the order of the county judge, acting as commissioner to adjudicate claims against the estate of Brocker, presented a claim against said estate for a sum exceeding \$20, and that the whole claim was disallowed; that, within sixty days after such disallowance, the claimants presented and filed a written application for an appeal from such order; that such appeal was allowed by the county judge, and a bond on such appeal was given and approved by such judge, and an order made by him requiring the appellants to serve the notice of the appeal upon one of the administrators of the deceased twelve days before the commencement of the next term of the circuit court for Fond du Lac county. We think this record shows a substantial compliance with the statute. Secs. 20-23, ch. 101, R. S. 1858; Tay. Stats., pp. 1229-30; *Hardwick v. The Estate of Du-*

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chaine, 32 Wis., 155. That there was an application for an appeal, within the meaning of the statute, sufficiently appears from this record. There was proof of service of a notice of the appeal by leaving a copy of such notice with the wife of one of the administrators of the estate. The county judge ordered that service of said notice should be upon R. Ebert, one of the administrators. It is urged that this order was void; that the order should have directed the notice to be served upon the adverse party, without naming the party. That an order made in that general form would be good when the proof shows that it was in fact served upon the adverse party, was decided in *Nelson v. Clongland*, 15 Wis., 392; and we have no doubt but an order directing it to be served upon the person or persons who are in fact the adverse parties, would be equally good, provided it was properly served upon such persons so named in the order. Rudolph Ebert was an adverse party in this case, and a proper party on whom to serve the notice, and, perhaps, in the absence of any evidence of collusion on his part with the claimants, a direction to serve on him alone would be good, although there were two other acting administrators. It is, however, unnecessary to decide that question in this case.

Admitting that the service should have been upon all of the administrators, or, if not served upon all the adverse parties, that the proof of service upon Ebert should have shown that he could not be found in the county, and that the person who served the notice by copy explained the contents thereof to the person with whom he left it, we still think the appeal should not have been dismissed for either of these defects, for the reason that the adverse parties appeared generally in the circuit court by their attorneys, by obtaining and arguing the motion to show cause why the appeal should not be dismissed, and thereby waived all irregularities in the service of the notice of appeal. The motion to dismiss was not confined to the point that there had been no proper service of the notice of

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the appeal, and that therefore the appellate court had not obtained jurisdiction of the parties defendant, nor to other matters which went solely to the jurisdiction of the appellate court.

One ground which was made in the motion to dismiss, and urged upon the court, was, "that there was no evidence that the notice of the appeal had been given to the adverse party." This was clearly not a question which went to the jurisdiction of the appellate court. The fact of service gives the court jurisdiction. If there had in fact been a proper service of the notice upon the adverse party, the evidence might have been filed after the motion was made, and the motion would have been defeated thereby, so far as that ground was a reason for granting the same. Sec. 24, ch. 101, R. S. 1858, requires that the party appealing shall cause proper evidence of the service of the notice of the appeal upon the adverse party, according to the order of the county court, to be filed in the circuit court at or before the first day of the next term of such court after the appeal is allowed. It is evident, however, that the filing of such evidence is not a matter which goes to the jurisdiction of the appellate court, and that such evidence may be waived by the appearance of the adverse party in the appellate court, and going to trial upon the merits of the case. A motion to dismiss the appeal on the ground that there was no evidence filed in the circuit court of the service of the notice of the appeal, by implication admits that there was a service in fact, and therefore admits the jurisdiction of the court over the person of the appellant.

Two other reasons assigned in the motion to dismiss the appeal were not jurisdictional — "that no notice of appeal had been served on the county judge, and no notice of appeal had been filed in the office of the county judge." Neither of these things is required by the statute; and, although it might be good practice to do both, still the want of either or both would not divest the appellate court of jurisdiction to try the cases.

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That the appearance of the defendants, and their making the motion to dismiss the appeal for the causes set forth in the motion, was a general appearance in the case, and a waiver of any defects in the service of the notice of appeal, is fully sustained by the following decisions: *Grantier v. Rosecrance*, 27 Wis., 488; *Anderson v. Coburn*, id., 558; *Alderson v. White*, 32 Wis., 308; *Ruthe v. R. R. Co.*, 37 Wis., 344.

The fifth general ground for urging that the appeal should have been dismissed, is, that the bond given was not such as the statute requires.

The first and principal objection to the bond is, that it is given by Kasson & Noyes as principals, without adding their initials or giving their names in full; that they have given a bond, in fact, as partners, and not as individuals. By an examination of the record of the proceedings on the claim returned by the county court to the circuit court, it will be seen that the claim was presented by them in their name as partners, "Kasson & Noyes;" and the judge, in his order disallowing the claim, recites the claim as the claim of "Kasson & Noyes" against the estate of Brocker, and disallows the claim as the claim of "Kasson & Noyes." We think it was regular, therefore, for the claimants to give their bond in their partnership name, and that there can be no exception to it upon that ground. As the bond was approved by the county judge, in the absence of all proof upon the subject, it must be presumed it was executed so as to bind both the partners. A bond signed by one partner in the partnership name will bind all the partners consenting to such signature. Story on Partnership, §§ 120-122; *Cady v. Shepherd*, 11 Pick., 405, 406; *Gram v. Seton*, 1 Hall, N. Y., 262; *Wilson v. Hunter*, 14 Wis., 683; *Waterman v. Dutton*, 6 Wis., 265; Parsons on Partnership, 194-6, and notes; Lindley's Law of Partnership, 278.

If the partners are bound by the bond, then they have promised to pay, and have bound their heirs. We do not

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think there is any force in the objection that the bond does not run to the adverse party. It is admitted that the administrators are the adverse party in this case, and the bond runs to them by name, and they are designated in the bond as the administrators of Bocker's estate. There can be no doubt but that, upon a breach of this bond, the administrators as such could maintain an action thereon. The meaning of the bond is quite as clear as though the word "as" had been inserted between their names and their title, "administrators, etc." It is true that courts have held that the words "administrator, etc.," placed after the name of a person in a contract, may be treated as *descriptio personæ*, and that, notwithstanding such words, an action upon such contract may be maintained by or against the party in his individual name; but this rule would not apply to a bond required by statute to be given to them in their representative capacity in a judicial proceeding. The circumstances under which the bond was given would, in such case, give it a different construction.

It is claimed that the bond given is not the bond required by the statute, and therefore the circuit court obtained no jurisdiction of the appeal. If the bond given is not substantially the bond required by statute, then, according to the decision of this court in *Hardwick v. Duchaine*, 32 Wis., 155-158, the appeal should have been dismissed. The statute requires that the condition of the bond shall be, "that he [the appellant] shall prosecute his appeal to effect, and pay all damages and costs which may be awarded against him on such appeal." Sec. 21, ch. 101, R. S. 1858. The condition in the bond given is, "to pay all damages and costs that may be awarded against them [the appellants] in case they shall fail to obtain a reversal of the decision of the judge of the probate court for Fond du Lac county, rendered April 13, 1878, on a claim of said Kasson & Noyes against the said estate of P. Bocker, from which said decision the said Kasson & Noyes have appealed to the circuit court of Fond du Lac county; and further, that they

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will diligently prosecute such appeal without any fraud or other delay."

If the condition of this bond had omitted the words "in case they shall fail to obtain a reversal of the decision of the judge," etc., giving a description of the judgment appealed from, it would clearly have been a substantial compliance with the statute. The first clause would very clearly have rendered the obligors liable to pay all costs and damages awarded against them on the appeal; and the last clause was certainly a condition to prosecute the appeal to effect; for if it was prosecuted with diligence, and without fraud or delay, the prosecution would necessarily be a prosecution "to effect." The words "to effect," as used in the statute, do not mean that the appellant shall prosecute his appeal to a successful issue in his favor, but that he will prosecute the same with due diligence to a final issue or judgment, whether successful or not. This is clear from the words in the statute which immediately follow the condition, "and pay all damages and costs which may be awarded against him on such appeal." Taking the two parts of the condition of the bond as prescribed by the statute, they can mean nothing more nor less than that the appellant shall prosecute his appeal to a final judgment, and, if defeated, will pay all costs and damages which may be awarded against him; and it implies all there is in the condition of the bond given in this case, omitting the clause above indicated. A prosecution to effect implies a diligent prosecution, without fraud or unnecessary delay.

Do the words following the first condition in this bond change the liability which the obligors would be under to the obligees if they had been omitted, to the prejudice of such obligees? We think not. They may therefore be treated as surplusage, or as not substantially changing the condition of the bond required by statute. If the words, "in case they shall fail to obtain a reversal of the decision of the county

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judge," limit the obligation to pay all costs and damages which may be awarded against them, such limitation is not prejudicial to the rights of the obligees, because the appellate court would have no right to award damages and costs against the appellants upon their appeal, which would be recoverable upon the statutory bond, except upon the final determination of the case. And certainly the court could not award damages or costs against the appellants in case they succeeded in reversing the decision of the county judge disallowing their claim. If, therefore, the appeal should be dismissed, or a final judgment be rendered in the circuit court against the appellants, the costs and damages awarded against the appellants could be collected as well under the conditions of this bond as under the conditions prescribed by the statute, as in either case the appellants would have failed to reverse the decision of the county judge appealed from; and, as the court would have no power to award costs or damages against the appellants in any other case, the obligee in the bond is not prejudiced by the supposed limitation.

The rule applicable to bonds in cases of this kind is, that if the bond substantially covers the provisions of the statute, and secures to the appellee all that the law designed for him, it is sufficient. The language of the statute need not be adopted. *Smith v. Norval*, 2 Code R., 14; *Doolittle v. Dinenny*, 31 N. Y., 350; *Coleman v. Rowe*, 4 Sm. & M., 747.

We think the bond filed in this case comes within the rule laid down in these decisions; that it is in substance the same as the one required by statute; that the additions in it, not required by the statute, do not prejudice the obligees; and that it is therefore a sufficient bond. As was said by the present chief justice of this court in *Mullin's Appeal*, 40 Wis., 154-156: "It is always the duty of all courts, where it can be done, to overcome and disregard such clerical errors, *ut res magis valeat quam pereat*." This remark may be applied, not only to the objection to the form of the bond, but to all

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the other objections to the regularity of the proceedings in this case.

By the Court.—The order of the circuit court is affirmed.

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COMPANY.

INSURANCE AGAINST FIRE. (1-3) *General rules of construction.* (4, 5)
Case stated: Application and policy construed: Warranties: Promissory undertakings.

1. A stipulation in an application for fire insurance, construed, in a doubtful case, most strongly against the insurer, by whom it was framed.
2. In a doubtful case, that construction of a contract which will save it, is to be preferred to one which will destroy it.
3. The use of the word "warranty" in a contract will not always control its construction; as there may be a warranty without use of that word, and its use will not always create one.
4. An application for insurance against fire, on a printed form furnished by the company, contained over a hundred interrogatories, with answers thereto, and a statement that the applicant covenants and agrees with the company "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, *so far as the same are known to the applicant and are material to the risk*; and the same is hereby made a condition of the insurance and a warranty on the part of the assured." The policy provides that the application "shall be considered a part of this policy, and a warranty by the assured." *Held,*

(1) That the stipulation in the policy that the application shall be considered a warranty by the assured, must be construed to mean *such* a warranty as is stipulated in the application itself.

(2) That the clause, "*so far as the same are known to the applicant,*" etc., is not an *additional* stipulation that the assured has stated all facts known to him material to the risk, though not called for in the interrogatories; but it *qualifies* the preceding clause, changing it from an absolute covenant that all the answers are true, to a covenant that they are true "*so far as known,*" etc.

(3) That in an action upon the policy, therefore, it cannot be held void merely because the application contains some false statements of fact, but it must be shown that these were known by the assured to be false, and were material to the risk. And as to a promissory or continuing

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undertaking, true when made but afterwards departed from, it must appear that the change increased the risk, and was thus material.

5. To the question, what material was used in lubricating the machinery, the assured answered, "Lard and sperm oil;" and to the questions, whether the machinery was regularly oiled, and, if so, by whom and how often, the answer was: "Yes, by engineer and miller, as often as necessary." The proof was, that, during the whole life of the policy, an oil known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by plaintiffs for that purpose. *Held*, that the insurer could not escape liability on these facts, without proof that the use of said "Fine Engine Oil," instead of lard and sperm oil, was known to the assured, or that the risk was increased by the fact that some person other than the miller or engineer usually oiled the machinery.

APPEAL from the Circuit Court for *Monroe* County.

Action on a policy of insurance issued by the defendant on certain machinery of the plaintiffs in their flouring mill in the city of Prescott. A written and printed application for the insurance, signed by the plaintiffs, preceded the policy. This application is in the usual form, of questions by the insurer, relating to numerous matters supposed to affect the risk, and the answers of the plaintiffs thereto. It closes with the following stipulation: "And the said applicant hereby covenants and agrees to and with said company, that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to the applicant and are material to the risk, and the same is hereby made a condition of the insurance, and a warranty on the part of the assured." The policy provides that the application "shall be considered a part of this policy, and a warranty by the insured."

The case is more fully stated in the opinion.

The court below rendered a judgment of nonsuit against the plaintiffs; from which they appealed.

For the appellants, there was a brief by *J. S. White*, their

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attorney, with *Vilas & Bryant*, of counsel, and oral argument by *Wm. F. Vilas*. They contended, among other things, that if there was a "promissory warranty" by the assured, a breach of which is relied upon to avoid the policy, the burden was upon the defendant to prove such breach (*Troy F. Ins. Co. v. Carpenter*, 4 Wis., 20; *Cassacia v. Phoenix Ins. Co.*, 28 Cal., 628; *Lounsbury v. Ins. Co.*, 8 Conn., 459; *Mut. Ben. L. Ins. Co. v. Cannon*, 48 Ind., 264; *Comm. Ins. Co. v. Moninger*, 18 id., 352; *Forbes v. Ins. Co.*, 15 Gray, 249; *Flynn v. Ins. Co.*, 17 La. Ann., 135); that the defense set up in the answer, in respect to the lubricator used, was, that plaintiffs had used "*an inferior and far less safe oil*," whose use may have caused the fire, and defendant should be confined to that defense (*Wood on Ins.*, 830); that plaintiffs' evidence, giving it a favorable construction for them (*Imhoff v. Railway Co.*, 22 Wis., 683-4), tended to prove that the oil which they used was in fact composed of lard and sperm oil, and therefore the nonsuit was error; that at least plaintiffs' evidence showed that they had exercised ordinary care and diligence to obtain an article composed of lard and sperm oil, and had used the "Fine Engine Oil" in good faith, believing that it was so composed, and this was all that could be required of them. *Wood on Ins.*, 144, 327, 848; *Bronson v. Wiman*, 10 Barb., 426; *Swinerton v. Ins. Co.*, 37 N. Y., 189; *Marshall v. Am. Exp. Co.*, 7 Wis., 20. As to the construction of the contract, they argued that the understanding and intention of the insured are to be considered equally with those of the insurer; that the writing should in fact be construed unfavorably to the insurer, by whom it is prepared, rather than to the party who receives it (*Wood on Fire Ins.*, § 171); that plaintiffs, as sensible men, can hardly be supposed, without clear evidence of the fact, to have agreed that, during the term of the policy, they would use nothing but lard and sperm oil, and that if they used anything else, though safer and better for their property and for the insurer's risk, they should forfeit all indemnity in case of

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loss, although the loss was entirely disconnected with such use; that there was nothing in the contract to produce that effect, unless it were the declaration in the policy that the application should be considered as a warranty; that when the policy refers to the application, made several weeks before the policy was issued, and declares it to be a warranty, it must be understood as referring to the whole of it together, and requiring it to be considered no more a warranty, or limitation of the contract, than the application alone makes it to be (*Lindsey v. Ins. Co.*, 3 R. I., 157, 160; *Miller v. Life Ins. Co.*, 31 Iowa, 217); that there is not a word in the application which indicates an agreement on the part of the insured that they would continue during the term of the insurance the use of the oil which they were then using; that the form of the question as to lubricating oil, "What material is used," etc., indicates that no specific kind of oil was in the insurer's mind as necessary to the acceptance of the risk; that the form of the question would naturally have been, "Will lard and sperm oil be used?" if it had been intended to limit plaintiffs to the use of that specific article during the life of the policy; that insurers, who prepare their own contracts, should not be allowed to accomplish unjust and unreasonable forfeitures, unless they are provided for by the clear and definite language of the contract itself, so that the insured can appreciate the risk he incurs (*Ins. Co. v. Slaughter*, 12 Wall., 404; *Wilson v. Ins. Co.*, 4 R. I., 156; *Anderson v. Fitzgerald*, 24 Eng. L. & E., 13, per Lord St. LEONARDS); that the very language in the caption of the application, which declares that "the applicant will answer the following questions, and sign the same as a description of the premises, on which the insurance will be predicated," and the form of the questions themselves, all of which are in either the present or the past tense, as well as their number and minuteness, and the character of many of the inquiries, show that a representation of existing facts was intended; that the statement that "the foregoing is a just, full and true exposition

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of all the facts and circumstances *so far as known to the applicant and material to the risk*," also shows clearly that plaintiffs agreed only that the application was an exposition of certain facts and circumstances, and was a condition of insurance or a warranty only so far as those facts were known to them and material to the risk (*Aurora F. Ins. Co. v. Eddy*, 55 Ill., 213; *Schmidt v. Ins. Co.*, 41 id., 295; *U. S. F. & M. Ins. Co. v. Kimberly*, 34 Md., 224; *O'Neil v. Ins. Co.*, 3 N. Y., 122; *Smith v. M. & T. F. Ins. Co.*, 32 id., 399; *Sayles v. Ins. Co.*, 2 Curtiss C. C., 610); that there is certainly nothing in such an application which implies an agreement by the insured that the contract should be forfeited by the subsequent use of an oil not wholly of lard and sperm, but fully as safe (*Garcelon v. Ins. Co.*, 50 Me., 580; *Lindsey v. Ins. Co.* and *Miller v. Ins. Co.*, *supra*; *Parker v. Ins. Co.*, 10 Gray, 302); that the doctrine of "promissory warranty" has not been settled in this state, and is in such a condition of confusion and uncertainty elsewhere as to leave this court free to adopt a just and honest rule; that, as parties have the right to make their own contracts, the insurer and the insured should be permitted to agree *in plain and distinct terms* that the latter shall perform, during the life of the policy or within some shorter period, certain covenants or agreements, and that unless he shall literally and strictly fulfill them, the insurance shall be forfeited; that such a consequence, however, should not be inflicted for breach of an agreement to perform certain acts or maintain certain conditions, except when it is plainly stipulated and bargained for; that, in the absence of such plain and distinct stipulation for a forfeiture, the consequences of a deviation from the agreement should be adjudged with justice according to the nature of the undertaking; that the doctrine, sometimes adopted in insurance cases, that there must be a strict and literal performance of every continuing agreement by one of the two contracting parties, at the peril of absolute loss of all

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claim to performance by the other, thus adjudging for the most trivial and harmless deviation from the literal promise, the utmost forfeiture that could be adjudged for the grossest and most fraudulent violation of the contract, is in defiance of the principles which govern all other contracts; and that in all cases, unless the terms of the contract explicitly demand a literal performance, a *substantial performance* should be held sufficient. *Percival v. Ins. Co.*, 33 Me., 242; *Crocker v. Ins. Co.*, 8 Cush., 79; *Underhill v. Ins. Co.*, 6 id., 440; *Hovey v. Ins. Co.*, 2 Duer, 554; *N. Y. Belt & Pack. Co. v. Ins. Co.*, 10 Bosw., 428; *Sayles v. Ins. Co.*, 2 Curt. C. C., 610; *Peoria M. & F. I. Co. v. Lewis*, 18 Ill., 553; *Ins. Co. of N. A. v. McDowell*, 50 id., 120; *Hide v. Bruce*, 3 Dong., 213; *Arcangelo v. Thompson*, 2 Campb., 620; *Garcelon v. Ins. Co.*, *Lindsey v. Ins. Co.* and *Parker v. Ins. Co.*, *supra*. See also *First Nat'l Bank v. Hartford Ins. Co.*, 6 Cent. L. J., 316; *Morse v. Ins. Co.*, 30 Wis., 540; *Hoffman v. Ins. Co.*, 32 N. Y., 414-15; Wood on Ins., 329.

J. W. Lusk, for the respondent:

1. The complaint charges, and the answer denies, that plaintiffs duly performed all the conditions of the policy on their part. This was sufficient to admit evidence of any breach whatever. Besides, the evidence as to breaches was admitted without objection; and it is too late now to object that there was a variance. . *Bowman v. Van Kuren*, 29 Wis., 215; *Matthews v. Baraboo*, 39 id., 677. 2. Plaintiffs' evidence showed clearly that the oiling was not done by the miller or engineer. As to the lubricating material, while it is true that each proprietor, to the question put by his counsel, "What kind of oil did you use in your mill?" answered, "Lard and sperm oil," yet all their other answers and their own written admissions showed conclusively that this was not true. Taking their own evidence as a whole, therefore, and putting upon it the most favorable construction that could *legitimately* be given to it, it would not have sustained a ver-

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dict in their favor. That was sufficient to justify the nonsuit. *Woodward v. McReynolds*, 2 Pin., 268; *Gardinier v. Otis*, 13 Wis., 461; *Dodge v. McDonnell*, 14 id., 553; *Blair v. Dockery*, 24 id., 502; *Greening v. Bishop*, 39 id., 553; *Steves v. Railroad Co.*, 18 N. Y., 425; *Silliman v. Lewis*, 49 id., 384. 3. The application and policy must be construed as if both were contained in one instrument. 2 Parsons on Con., 5th ed., 503, and cases there cited; May on Ins., 162; Wood on Ins., 271; *Burritt v. Ins. Co.*, 5 Hill, 191; *Battles v. Ins. Co.*, 41 Me., 208. 4. The statements of the application as to the persons by whom, and the material with which, the machinery was lubricated, were continuing warranties; and evidence that the material used was as safe as that named in the application, was properly excluded. *Blumer v. Ins. Co.*, 45 Wis., 622; *May v. Ins. Co.*, 25 id., 304; *Hinman v. Ins. Co.*, 36 id., 164; *Arthur v. Ins. Co.*, 30 Pa. St., 315; *First Nat. B'k v. Ins. Co.*, 50 N. Y., 45; 2 Parsons on Con., 5th ed., 499; Wood on Ins., 321.

John C. Spooner, of counsel, on the same side:

1. "Stipulations in the policy, or, what is the same thing, stipulations in some other writing which the parties expressly agree shall be a part of the policy, although not inserted in it, whether the same are statements of existing facts, or that certain acts shall thereafter be done, or a certain condition of things continue, are in general *part of the contract and express warranties*, unless it can fairly be gathered from the entire contract that the parties did not so intend." *Blumer v. Ins. Co.*, 45 Wis., 622. "As a rule, when the application is referred to as forming a part of the contract, the statements therein contained are held to have the force and effect of warranties." May on Ins., 164; Wood on Ins., 271-2, and authorities cited in note 1. "Any statement or description, or any undertaking on the part of the assured, on the face of the policy, which relates to the risk, is a warranty, an express warranty, *and a condition precedent*." Wood on Ins., 341,

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citing 13 Conn., 533. 2. In this case, the application is expressly made a part of the policy, and a warranty by the assured. The words, "so far as the same are known to the applicant and are material to the risk," do not destroy the character of the agreement as a warranty. Certain questions were put to the applicants, and answered by them. Presumably, they answered only as to matters which were *known* to them.* The insurer made them material by the interrogatories concerning them. After answering them, the applicants covenant that the known facts thus stated by them are a true exposition of all the facts and circumstances in regard to the condition, etc., of the property, "so far as the same are known to the applicant, and are material to the risk." This does not qualify what is stated as known; it is an admission that what is stated is material, and a covenant against *concealment of other known and material facts*. 3. The statements as to the kind of lubricating oil used, and the persons who oiled the machinery, were continuing or promissory warranties. *Blumer v. Ins. Co., supra*. 4. Warranties are conditions precedent, and the burden of proof was upon the plaintiffs. *May on Ins.*, p. 192, § 183; *Wood on Ins.*, p. 867; *Wilson v. Ins. Co.*, 4 R. I., 169; *McLoon v. Ins. Co.*, 100 Mass., 472; *Cory v. Ins. Co.*, 107 id., 140; *Campbell v. Ins. Co.*, 98 id., 381; *Daniels v. Ins. Co.*, 12 Cush., 416; *Ripley v. Ins. Co.*, 30 N. Y., 136; *Bobbitt v. Ins. Co.*, 66 N. C., 70. [Counsel criticised various cases, cited in opposition to this view, as not pertinent.] 5. Warranties must be strictly complied with, whether material to the risk or not. *Wood on Ins.*, 272; *May on Ins.*, 161, 192; *Ripley v. Ins. Co., supra*; *Nicoll v. Ins. Co.*, 3 Woodb. & M., 529; *Wood v. Ins. Co.*, 13 Conn., 533; *Mut. B. L. I. Co. v. Miller*, 39 Ind., 475; *Parker v. Ins. Co.*, 10 Gray, 302; *Wood on Ins.*, 317. 6. Evidence to show that plaintiff supposed that they were purchasing and using lard and sperm oil, and acted in good faith, was inadmissible. *Wood on Ins.*, 305; *Smith v. Columbia Ins. Co.*, 17 Pa. St., 253; *Cooper v. Ins.*

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Co., 50 id., 299. "The question whether a warranty has been broken, can never depend upon the knowledge, ignorance or intent of the party making it, touching the acts or the facts constituting the breach." *Mead v. Ins. Co.*, 7 N. Y., 530.

LYON, J. When the case of *Blumer v. The Phoenix Ins. Co.* (45 Wis., 622) was decided, a majority of the members of the court were of the opinion that positive and unqualified statements of the insured, contained in the application for the insurance, in respect to the precautions used against fire, although in the present tense, are, in general, continuing or promissory undertakings, in the nature of express warranties, if made so by the contract; and that a failure by the insured to continue such precautions during the term of the policy is fatal to the contract. A reargument of that case has been ordered, and will probably be had at the next term. We do not wish to decide the question there involved before the case is reargued, and we do not find it necessary to do so on this appeal. For the purposes of this case, it will be assumed that *Blumer v. The Ins. Co.* was correctly decided in the first instance, and the case will be considered from that standpoint.

The nonsuit was ordered on the ground that the uncontradicted evidence proved that the contract of insurance had been forfeited, and the insurer released therefrom, for the following reasons and those only. Two of the interrogatories in the application for insurance, and the answers of the plaintiffs thereto, are as follows: "What material is used for lubricating or oiling the bearings or machinery?" Ans. "Lard and sperm oil." "Is the machinery regularly oiled? If so, by whom and how often." Ans. "Yes, by engineer and miller, as often as necessary." The evidence seems to show conclusively that during the whole life of the policy an oil known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled

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by the engineer or miller, but by another person specially employed by the plaintiffs for that purpose.

The learned circuit judge held that the answers to the above questions were absolute and continuing undertakings in the nature of express warranties, and that the failure by the plaintiffs to use lard and sperm oil, and to have the machinery oiled by the engineer or miller, invalidated the contract of insurance and released the defendant from any and all obligations under it. Hence the nonsuit. This ruling ignored the questions whether the plaintiffs knew that there had been a departure from the requirements of the contract in respect to the oil used for lubricating purposes, or the person who used it, and whether the risk or hazard of fire was thereby increased.

By the terms of the policy the application is made a part of it. The two instruments are therefore parts of the same contract, and must be construed together, as though all of the statements and stipulations contained in each were written in one instrument. Hence the stipulation at the close of the application must be treated as if written in the policy.

It is manifest that such stipulation is not qualified or changed by anything in the policy. The condition therein that the application shall be considered a warranty by the assured, means just such a warranty as is stipulated in the application — no more and no less. Were this doubtful, the fact that the application came under the immediate scrutiny of the assured while negotiations for the insurance were pending, and the policy did not, would resolve the doubt by making the stipulation in the application controlling. Hence, the case turns entirely upon the construction of the stipulation in the application.

Counsel for defendant maintain that the first clause of the stipulation, to wit, that "the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured," is not qualified or affected by the next sentence — "so

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far as the same are known to the applicant, and are material to the risk,"—but that such sentence is an additional stipulation that the insured have stated in the application all facts known to them which are material to the risk, although the information is not called for in the interrogatories. If this is the correct construction, the plaintiffs covenanted against both the *suggestio falsi* and the *suppressio veri*, and it would seem to follow that a breach of the covenant in either respect would be fatal to the contract under the last clause of the stipulation, which reads, "and the same is hereby made a condition of the insurance, and a warranty on the part of the assured." But the defense does not rest upon any alleged concealment of facts material to the risk and known to the plaintiffs, but upon their false affirmations, or their failure to comply with continuing or promissory undertakings, in respect to the precautions used, or to be used, against loss by fire of the insured property. Hence, the construction contended for would render the words "so far as the same are known to the applicant and are material to the risk" entirely immaterial and inapplicable in the present case.

Omitting these words from the stipulation, there remains a positive unqualified covenant that the statements contained in the application are true. This would make the case substantially like the *Blumer* case, and would sustain the nonsuit on the hypothesis assumed at the outset.

On the other hand, counsel for the plaintiffs maintain that the words "so far as the same are known to the applicant and are material to the risk," contained in the stipulation, qualify and limit the preceding clause, and restrict the condition and warranty thereafter mentioned to such statements in the application as were material to the risk and known to the plaintiffs to have been false. Under this construction, the contract cannot be declared void unless it is made to appear, not only that the application contains some false statement of fact, but that the insured knew it to be false, and that the same was

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material to the risk. And as to a promissory or continuing statement or undertaking, true when made, but afterwards departed from, it must appear that the change increased the risk or hazard of loss, or it is immaterial.

It seems obvious that one of the constructions contended for must be adopted; and the question is, Which of the two is the more reasonable and just? In determining this question, we shall enter into no minute analysis of the stipulation, nor indulge in any extended discussion. There are a few general considerations which control our judgment, and these will be very briefly noticed.

In the first place, we think there is no authorized rule of construction which will permit us to hold that the stipulation may be extended to facts and circumstances concerning which no interrogatory is propounded in the application. More than one hundred questions are propounded therein to the plaintiffs, calling for most minute information upon every matter which would seem to be of any interest to the insurer, and there is no general interrogatory calling for information in respect to matters not specially inquired after. Under these circumstances, the plaintiffs might well have believed that every fact which the insurer deemed material to the risk was specially called for, and that the stipulation was only intended to bind them to good faith in their answers to the interrogatories propounded to them. We think any intelligent and prudent business man would have so understood it. The stipulation was framed by the insurer, and had it been intended to require the insured to go beyond the interrogatories and disclose facts not called for therein (if any existed) material to the risk, a general interrogatory calling for such facts would have been inserted; or, at least, the stipulation would have been framed to express that intention more clearly. We cannot assume that the insurer would leave its intention in that behalf to rest in uncertain and doubtful inference, when it was so easy to express it clearly and unmistakably. If these views are correct,

they are fatal to the construction claimed on behalf of the defendant.

Moreover, that construction would work a forfeiture of the contract, and it is a maxim that, in a doubtful case, the construction should be preferred which will save the contract, rather than one which will destroy it.

The use of the word *warranty* in the stipulation is not very significant; certainly it does not control the construction. There may be a warranty without the use of the word, and its use may not in every case create one. The vendor of a horse who represents to the purchaser that the animal is sound, the purchaser relying upon such representation, warrants the soundness of the horse, although he does not use the word *warrant*. But, unless the representation is material, it is no warranty. On the other hand, if the vendor *warrants* the horse sound so far as he knows, that is no warranty in the legal sense of the term, and he can only be held liable for an unsoundness on proof that he knew the fact. That is, he is not liable as a warrantor, but only for his fraudulent and false representation. And here too the representation must be material, that is to say, it must have been an inducement to the contract, or there is no liability. So the stipulation under consideration, notwithstanding the use of the word *warranty*, may, without doing violence to the language employed, be construed as merely an agreement against false and fraudulent material statements in the application. Regarding the statements upon which this case turns as continuing or promissory representations, the same elements of knowledge by the plaintiffs that they were false or have been departed from, and of materiality, must be proved to exist, or the contract cannot be held void.

For the reasons above suggested, and because we believe that to be the more natural and reasonable construction of the language employed in the stipulation, we adopt the construction claimed on behalf of the plaintiffs. This is substantially

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the construction given to a similar clause in a policy in *Houghton v. Ins. Co.*, 8 Met., 114.

We hold, therefore, that, to escape liability on the policy, the defendant must show that the use of "Fine Engine Oil," instead of lard and sperm oil, was known to the plaintiffs, and increased the risk; or that the risk was increased by the fact that some person other than the engineer and miller usually oiled the machinery.

The judgment of nonsuit cannot be sustained unless such conditions of knowledge and materiality were conclusively proved. That they were not, will scarcely be denied. Besides, testimony offered by the plaintiffs to negative the existence of one of these conditions, was rejected. The judgment must be reversed for the following reasons:

I. The testimony tended to prove that the plaintiffs believed that the oil used in their mill for lubricating purposes, although denominated "Fine Engine Oil," was a compound composed mainly of lard and sperm oil. We think the testimony was sufficient to send that question of knowledge to the jury.

II. The court rejected testimony which, had it been received, might have tended to show that the oil used in the mill during the life of the policy was as good and safe as lard and sperm oil. The evidence should have been received on the question of the materiality of the statement on that subject in the application.

III. There does not appear to be any evidence that the machinery was not properly oiled by the person employed for that purpose. If it was properly oiled, the representation in that behalf, although false, is immaterial. The burden was upon the defendant to show the materiality of the statement, and it failed to do so.

By the Court. — Judgment reversed, and cause remanded for a new trial.

Cotzhausen vs. Simon.

COTZHAUSEN VS. SIMON.

SPECIAL VERDICT. (1) *General rule as to its character.* (2) *When "willfulness" of fraudulent misrepresentations immaterial.* (3) *Answer to special verdict held insufficient.* (4) *Material omission to answer.* (5) **EXCEPTIONS** for review of findings of special verdict.

1. In an action at law, where there is no general verdict, the material issues of fact should be passed upon by the special findings of the jury; and such findings should be so full, clear and consistent, that the proper judgment may be rendered thereon as a legal conclusion from the facts found.
2. In an action for damages accruing from defendant's fraudulent misrepresentations in the sale of a mortgage of land, where the misrepresentations were material and false, and defendant had the means of knowing, or ought to have known, that they were untrue, and plaintiff did not know, and had not the present means of knowing, their falsity, and relied upon them as true, it is immaterial whether defendant made them *willfully* or not.
3. To the question, whether defendant was aware, at the time of selling the mortgage, that plaintiff was a resident of Milwaukee and had never seen the lands, was unacquainted with their condition and value, and had no time or opportunity to examine for himself, and whether, in buying the mortgage, he relied solely upon defendant's representations, the jury answered, "He did not." *Held*, insufficient, the most material parts of the question being left unanswered.
4. One of the false representations charged was, that a certain "shrewd and wealthy banker," resident in the vicinity of the property, had taken a mortgage on the same lands as security for a considerable sum, which was the second mortgage thereon *after* that sold to plaintiff; and the question as to this representation is ignored by the findings. *Held*, a material omission.
5. Defendant's motion for judgment on the findings having been granted against objection, and plaintiff's motion for a new trial, based in part on the defects in the findings, overruled, exceptions to these rulings bring the findings before this court for review, on appeal; and the judgment is reversed for the defects in such findings.

APPEAL from the Circuit Court for *Manitowoc* County.

Action for damages accruing from the defendant's fraud in a sale to plaintiff of a mortgage of land. The case is sufficiently stated in the opinion.

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For the appellant, there was a brief by *Cotzhausen, Sylvester & Scheiber*, and oral argument by *I. C. Sloan*.

For the respondent, there was a brief by *H. G. & W. J. Turner*, his attorneys, with *Wm. F. Vilas*, of counsel, and oral argument by *Mr. Vilas*.

ORTON, J. This is an action at law for damages, founded upon the fraud of the defendant in the sale to the plaintiff of a mortgage on certain lands in the county of Manitowoc.

The plaintiff sets up in his complaint the following representations of the defendant, claimed to have been false and fraudulent, and the inducement of the contract, by which he suffered damage:

First. "That the mortgaged premises were of great value; that they constituted one of the oldest and best farms in the county; that Mr. Altman, the owner, had frequently refused \$12,000 for the same, without the distillery; that farming lands like those could not be bought anywhere in the county at less than from \$70 to \$100 per acre; that the farm without the distillery was worth from \$10,000 to \$12,000, and that there would be no trouble in selling it at that figure," etc.

Second. "That there were no taxes unpaid on said property beyond those of the preceding year, amounting to but forty or fifty dollars."

Third. "That there were two mortgages on said premises subsequent to his [defendant's] own; that the third one was given for a loan or discount of twenty-five hundred dollars, procured by Altman from one Theodore Shove, a very shrewd and wealthy banker at Manitowoc, who would not have made this loan if the property were not of great value in excess of the securities; but that he [said defendant] feared, and had reason to believe, that said Shove would try to speculate against him by procuring the property to be sold on first mortgage for cash, so that he would not compete; and various other considerations were then urged by defendant upon this plaintiff, with

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a view of making this plaintiff believe that said mortgaged premises were more than double security for all liens and incumbrances, and for the purpose of inducing this plaintiff to buy the second mortgage above referred to."

The plaintiff further alleges, substantially, that he resided in Milwaukee, distant from the mortgaged premises; that he had never seen the same, and was entirely unacquainted with the land mortgaged, and other lands in the vicinity, and their value; that he was an old friend of the defendant, and had confidence in his integrity and sympathy for his financial embarrassments, and relied upon the representations so made, and was induced thereby to purchase said mortgage.

These representations are denied in the answer; and the testimony of the plaintiff tended to prove that they were so made, and that of the defendant, that they were not.

As there was no general verdict asked for or rendered, these material issues of fact should have been passed upon by the jury, and their special findings should have been so full, clear and consistent, that the proper judgment could have been rendered thereon as a legal conclusion from the facts so found. *Everit v. Walworth County Bank*, 13 Wis., 419.

It is to be regretted that, in a case of so much importance and so fully and ably tried, the findings are so defective, imperfect and irrelevant.

The very first finding is uncertain and evasive of the real issue. It embraces all of the representations referred to in the complaint, and leaves it uncertain whether they were made or not; but the inference by construction would seem to be that they were made, but not *willfully* made. This qualification of the representations, so made essential by the finding, was immaterial to the plaintiff's right of recovery. The finding is: "First question: Did the defendant, in May, 1875, *willfully*, for the purpose of inducing the plaintiff to buy the mortgage, make the representations referred to in the complaint, or representations substantially to that effect? An-

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swer: He did not." In case of fraud by misrepresentations, the defrauded party may rescind the contract *in toto*, and restore what he has obtained by it, or he may retain the property and sue for the damages he has sustained by reason of the fraud. *Grant v. Law*, 29 Wis., 99. In this case, if the representations were material and false, and the defendant knew, or had the means of knowing, or ought to have known, that they were untrue, and the plaintiff did not know, or have the present means of knowing, that they were false, and relied upon them as being true, and suffered damage thereby, it is immaterial whether the defendant made the representations *willfully* or *intentionally*, or not; for he had no right to make even a mistake in facts so material to the contract, except under the penalty of responding in damages; and in the application of this principle there is no difference between actions at law for damages and suits in equity to rescind or set aside the contract. *Bird v. Kleiner*, 41 Wis., 134. It is true, in other findings, the making of the representations in respect to the value of the premises, both in gross and per acre, are specifically negatived, and the thirteenth finding in respect to the representation of the amount of the unpaid taxes upon the premises, is in the affirmative; but the above qualification — that the representations referred to in the complaint (of which this of the unpaid taxes was one) were not *willfully* made — might, by construction, qualify the thirteenth finding also.

The undisputed evidence was, that such unpaid taxes were one hundred and thirty-six dollars and over, instead of forty or fifty dollars, and for two years instead of one, and to this extent the representation was untrue, and the plaintiff was compelled to pay this excess, and thereby suffered damage to that amount and interest; and for such sum, at least, the plaintiff was entitled to judgment on this finding, if this qualification of *willfulness* and intentional fraud had been discarded, as it should have been.

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The most material part of the question in the second finding is left unanswered.

"Second question. Was the defendant aware at the time of the selling of the mortgage, that *Cotzhausen* was a resident of Milwaukee, and had never seen the lands; that he was unacquainted with their condition and value, and had no time or opportunity to examine for himself; and did the plaintiff, in buying this mortgage, solely act and rely upon the statements and representations of the defendant, *Simon*?" Answer. "He did not."

The facts embraced in this question are not found one way or the other, and they were very material to show whether the plaintiff knew, or had the present means of knowing, the truth or falsity of the representations, and whether he did or did not rely upon them. The general conclusion to be drawn from these facts, if true, might well be, that he did solely act and rely upon the representations, while the jury find that he did not, and ignore the facts altogether; a most material omission.

The second representation stated in the complaint, in respect to the third mortgage on the premises, executed to one Shove, a shrewd and wealthy banker of Manitowoc, for a loan or discount of the sum of twenty-five hundred dollars, by which the plaintiff claims the defendant represented the premises to be worth more than double the amount of all the securities and incumbrances upon the property, is also entirely ignored by the findings.

This representation, embracing the judgment and opinion of a gentleman so shrewd and wealthy, resident in the county where the land is situated, and presumably acquainted with its value, of such value, indicated by his willingness to invest and loan so large an amount of money upon a third or fourth mortgage upon the premises, might have reasonably been a very material inducement to the plaintiff to purchase the second mortgage; and yet we are left in ignor-

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ance whether it was so made, and, if so made, whether it was true or false.

There are several irrelevant and immaterial findings which need not be noticed.

The motion of the defendant for judgment upon the findings was granted against the objection and exception of the plaintiff; and the plaintiff's motion for a new trial, based in part upon the defects of the findings, was overruled; and thereby the exceptions are sufficient to raise the objections to the findings above considered. The deficiencies and imperfections of the findings are so apparent and material, that no judgment could be intelligently rendered upon them, which would dispose of all the issues in the case; and we therefore think there should be a new trial.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial.

DELANEY VS. McDONALD.*Grantor and grantee of land.*

The grantee of land cannot remain in possession of all the land which he claimed the deed should convey, rest several years after the discovery of an alleged deficiency of the land conveyed, pay the other notes given for the consideration of the conveyance, and then set up the deficiency of the land as a bar to recovery, or ground of recoupment, in an action on the last of such notes.

APPEAL from the Circuit Court for *Fond du Lac* County.

Action on a promissory note for \$250, dated July 1, 1870, and payable one year from date, with interest at seven per cent. No part of the note had been paid. The answer was, that the note was given for a part of the purchase money of certain described land sold by plaintiff to defendant; that at the time when defendant delivered to plaintiff this and other notes, and paid the balance of the purchase money in cash,

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plaintiff procured to be executed to him a deed containing a description of the land by metes and bounds, which defendant supposed to be a description of all the lands that plaintiff had agreed to sell and convey to him; that soon afterwards he discovered that a certain described portion of such land had been omitted from the deed; that thereupon he immediately procured to be prepared, and tendered to plaintiff for execution and acknowledgment, a deed covering that part of the lands so omitted, but plaintiff refused to execute it; and that defendant was ready and willing to pay the note in suit whenever plaintiff should execute to him a deed of the land so omitted. Upon these averments defendant demanded that the action be dismissed, with costs.

There was a special verdict, to the effect that there was a verbal contract between the parties by which plaintiff was to convey to defendant a certain strip of land containing about three-quarters of an acre not included in the deed which plaintiff caused to be executed and delivered to defendant; that the value of said strip was \$80; that defendant first discovered the omission of said land from the deed about the 19th of September, 1870; that since that time he had retained the title and possession of the land actually conveyed to him, and had never reconveyed, or offered to reconvey, or taken any steps to rescind the sale; and that the amount of the note, with interest to the date of the finding, was \$391.45. Upon this verdict, plaintiff moved for judgment for the full amount of the note, with interest, etc.; and defendant moved for judgment dismissing the complaint, etc. The court denied the plaintiff's motion, and rendered judgment in defendant's favor dismissing the complaint and for costs, etc. From this judgment the plaintiff appealed.

For the appellant, there was a brief by *Gilson & Ware*, and oral argument by *Mr. Gilson*.

The cause was submitted for the respondent on the brief of *Geo. P. Knowles*.

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RYAN, C. J. If the conveyance to the respondent did not convey all the land for which the parties bargained, his remedy was by a suit in equity, to reform the deed; possibly by counterclaim in this action. Possibly, also, upon discovery of the deficiency of the conveyance, he might have had the right at once to rescind the contract.

But certainly he could not remain in possession of all the land which he claimed the deed should convey, rest several years after his discovery of the deficiency of the land conveyed, pay all the other notes given for consideration of the conveyance, and then set up the deficiency of the land as a complete bar to recovery on the last note. *McIndoe v. Mormon*, 26 Wis., 588; *Grannis v. Hooker*, 31 Wis., 474; *Churchill v. Price*, 44 Wis., 540. Here there are no data even for recoupment for the deficiency. All the payments, on the respondent's own theory, applied equally on all the land to which the latter was entitled. So does the note in suit. And perhaps the finding of the jury, that the deficiency of land was worth \$80, and that there was due on the note \$391.45, is a better illustration of the extravagance of the bar claimed, than any this court could give.

If the respondent's theory of the case is correct, he appears to have still ample remedy by reformation of the deed. But he must pay the consideration of the deed for the land which he has actually held under the deed, whether the deed includes it or not. This is not the case of an executory contract, but a contract executed. And the cases turning upon executory contracts, cited by the learned counsel for the respondent, do not apply.

The appellant is clearly entitled to judgment for the amount found due on the note.

By the Court. — The judgment is reversed, and the cause remanded to the court below with directions to enter judgment for the appellant for the amount found due on the note.

CASES DETERMINED

AT THE

August Term, 1879.

BAKER VS. THE STATE.

BASTARDY ACT. *Proof of paternity.*

1. In a proceeding under the Bastardy Act, the paternity of the child is the material fact to be found by the jury; and this fact it must find as upon evidence placing it *beyond reasonable doubt*.
2. Upon the evidence in this case, this court holds it impossible to determine, beyond a reasonable doubt, whether B., the plaintiff in error, or one X., was the father of the child, it appearing from the evidence of the prosecutrix that she had intercourse with X. about two weeks after her intercourse with B., and that the child was born within thirty-seven weeks after the earlier intercourse; and the judgment upon a verdict against B. is reversed on that ground.

ERROR to the Circuit Court for *Iowa* County.

This was a proceeding in the court below against *Baker* as the father of the bastard child of one Anna E. Swagger. Verdict and judgment having gone against *Baker*, he brought the case here by writ of error.

For the plaintiff in error, there was a brief by *Strong & McArthur*, and oral argument by *Mr. Strong*.

The cause was submitted for the defendant in error on the brief of *H. W. Chynoweth*, Assistant Attorney General.

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ORTON, J. The judgment in this case must be reversed on the evidence.

The testimony of Anna E. Swagger, the prosecutrix, is positive that her last menstruation was the first of September; that she had sexual intercourse with the defendant about two weeks thereafter, and with one C. Greenalsh about two weeks after that; that her child was born the 25th of May; and that the defendant is its father.

In such cases the paternity of the child is the main and material fact to be found by the jury (*Speiger v. The State*, 32 Wis., 400), and this fact the jury must find beyond a reasonable doubt. *Zweifel v. The State*, 27 Wis., 396. Whatever the probabilities may be, from this evidence, that pregnancy resulted from the first act of sexual intercourse, which was with the defendant, because of its being the nearest the termination of the period of menstruation, and of the longer time before the birth of the child, yet they are mere *probabilities*, and, by the best medical authorities, very questionable, and by no means without reasonable doubt. 2 Wharton & Stillé, §§ 43, 44, 45 and 46, and cases cited.

The prosecutrix having had sexual connection with two persons within so short a time, it was impossible for her to testify which act produced pregnancy, and which person is the father of the child. *Commonwealth v. McCarthy*, 2 Pa. Law J., 351; *Commonwealth v. Fritz*, 4 Pa. Law J., 219.

In view of these undisputed facts, and of the most creditable authorities, the jury could not have found the defendant guilty beyond a reasonable doubt. Physiological speculations, natural probabilities, or merely probable cause, are quite insufficient upon the trial to establish the fact of paternity in such a case. There must be, from the very nature of such evidence, great, and certainly very reasonable, doubt as to this main fact. It is urged that if this is to be the rule, a conviction can never be obtained when more than one person has had sexual intercourse with the complainant about the same time.

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This consequence of the rule is far less important and serious than the wrong and injustice of a conviction upon insufficient evidence.

In such a case, the question is not whether the defendant is guilty of having had illicit intercourse with the complainant, but whether, by such intercourse, the child was begotten; and this fact must be found beyond a reasonable doubt. This being the true legal rule, the consequence of its strict observance by courts and juries is not to be considered, except in changing or abolishing the rule itself; but while the rule exists, the consequences will not be presumed to be wrong or mischievous, but rather right and just.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

TAYLOR J., dissents.

DAYTON VS. WALSH.

MARRIED WOMAN. *When crops, raised on wife's land with husband's aid, not liable for his debts.*

A married woman, having at the time no separate estate, purchased a farm of a stranger entirely on credit, giving her notes for the price, secured by mortgage of the property. Her husband lives with her on the farm, and controls the farm labor, carrying on the business in her name and as her agent, without any agreement as to his compensation for such services, and from the proceeds of the crops raised on the farm she has paid one year's interest on the purchase money, and a certain amount of the principal. The purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors: *Held*, that under the statutes of this state (ch. 44, Laws of 1850, and ch. 155, Laws of 1872; R. S. 1878, secs. 2342-3), crops raised upon said farm by their joint labor and management, belong to the wife, and are not subject to sale for the husband's debts. *Feller v. Alden*, 23 Wis., 301, followed, and *Lyon v. Railway Co.*, 42 id., 548, distinguished.

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APPEAL from the Circuit Court for *St. Croix* County.

Action for the wrongful taking and detention of chattels, consisting of grain and an agricultural machine. The facts are sufficiently stated in the opinion. Upon a finding of those facts the circuit court held the defendant entitled to the possession of the grain, and rendered judgment in his favor; from which the plaintiff appealed.

For the appellant, there was a brief by *Baker & Spooner*, and oral argument by *Mr. Spooner*. They contended, 1. That under sec. 3, ch. 95, R. S. 1858, and ch. 155, Laws of 1872, the land purchased by and conveyed to the plaintiff was her own property, notwithstanding the fact that it was purchased upon credit, and had to be paid for from her own earnings, and the notes given by her were enforceable against her as if she were a single woman. *Conway v. Smith*, 13 Wis., 138; *Stimpson v. Pfister*, 18 id., 276; *McVey v. G. B. & M. Railway Co.*, 42 id., 532. So far as *Wooster v. Northrup*, 5 Wis., 245, held a contrary doctrine, it has been overruled by the later cases (*Rogers v. Weil*, 12 Wis., 664), and rendered inapplicable by the act of 1872. The New York statute of 1848, which, excepting two immaterial words, is identical with ours, is construed as authorizing a married woman to purchase real or personal property on credit. *Darby v. Callaghan*, 16 N. Y., 71; *Knapp v. Smith*, 27 id., 277; *Buckley v. Wells*, 33 id., 518; *Gage v. Dauchy*, 34 id., 293; *Draper v. Stouvenel*, 35 id., 507; *Abbey v. Deyo*, 44 id., 343; *Herrington v. Robertson*, 71 id., 280. See also Wells on Sep. Prop. of Married Women, 240 et seq.; *Huyler's Ex'rs v. Atwood*, 26 N. J. Eq., 504; *Bongard v. Core*, 82 Ill., 19. Even if the law were as held in *Wooster v. Northrup*, and the purchase money could not be collected on plaintiff's notes, that would be a matter entirely between her and her vendor, not affecting her ownership or rights as to the world at large. *Ramborger v. Ingraham*, 38 Pa. St., 146; *Patterson v. Robinson*, 25 id., 82; *Darby v. Callaghan*, and *Knapp v. Smith*, *supra*. There was no allega-

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tion, proof or finding of fraud in the purchase, and there is no pretense that plaintiff's title of record is merely colorable. 2. That if the plaintiff was the owner of the farm, she was the owner of crops raised thereon for her under the management of her husband as her agent. If the husband had any interest in them, it was at most for the value of his labor and services, which can be ascertained only in an equitable proceeding. *Feller v. Alden*, 23 Wis., 301; *Rush v. Vought*, 55 Pa. St., 438. But he had no interest that could be reached by creditors. *Abbey v. Deyo*, *supra*. 3. That if plaintiff did not become owner of the land, and consequently of the crop, certainly her husband did not, but the title remained in her grantor of the land, by whom she was put in possession, and under whom she was in possession at the time of the levy, entitled to hold as against all the world except such grantor. *Darby v. Callaghan*, *supra*.

For the respondent, there was a brief by *N. H. & M. E. Clapp*, and oral argument by *N. H. Clapp*:

1. Evidence was properly admitted to show the husband's interest. Under a general denial, defendant in replevin may show title to the property in himself or a stranger. *Timp v. Dockham*, 32 Wis., 146. Where a debtor has placed the title to his property in some third person without consideration, and with intent to defraud his creditors, whether by his own direct act or conveyance or by a conveyance made by some person at the debtor's request, the creditors or those representing them may seize the property, and, in replevin against them, may show the debtor's real interest. *Osen v. Sherman*, 27 Wis., 501; *Godfrey v. Germain*, 24 id., 410; *Auble v. Mason*, 35 Pa. St., 261; *Walker v. Reamy*, 36 id., 410; *Robinson v. Wallace*, 39 id., 129. If the plaintiff holds title to the land in trust for her husband, and the *cestui que trust* is in possession and carries on the farm, do not the crops belong to him? 2. That the facts found sustain the conclusions of law. (1) In contests like this, the wife's claim is looked upon

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with suspicion, and must be clearly proven. *Stanton v. Kirsch*, 6 Wis., 338; *Horneffer v. Duress*, 13 id., 603; *Weymouth v. Railway Co.*, 17 id., 550; *Price v. Osborn*, 34 id., 40. (2) That a married woman may acquire a separate estate by purchase, and hold it against her husband's creditors, she must pay for it out of funds derived from some person other than her husband; and if the purchase price is acquired through the husband, as if the property is paid for with the husband's earnings, or with the joint earnings of husband and wife, then, in a contest between her and the husband's creditors, she cannot recover. *Gamber v. Gamber*, 18 Pa. St., 363; *Walker v. Reamy*, 36 id., 410; *Auble v. Mason*, 35 id., 261; *Farrell v. Patterson*, 43 Ill., 52; *Manny v. Rixford*, 44 id., 129; *Carpenter v. Tatro*, 36 Wis., 297. The findings show that plaintiff had no separate estate to invest in the land, and that the whole transaction was really a redemption of the land from mortgages given upon it by the husband, which redemption is to be effected by using proceeds of crops raised on the land under the husband's direction, and by the joint labor of husband and wife. Crops raised under such circumstances must be held, in a contest of this character, to belong to the husband. See, beside the authorities already cited, *Fitzpatrick v. Borbridge*, 2 Brews. (Pa.), 559; *Bucher v. Ream*, 68 Pa. St., 421; *Hallowell v. Horter*, 35 id., 379; *Baringer v. Stiver*, 49 id., 129; *Glidden v. Taylor*, 16 Ohio St., 509; *Quidort v. Pergeaux*, 18 N. J. Eq., 472; *Bear v. Hays*, 36 Ill., 280; *Wilson v. Loomis*, 55 id., 352; *Patton v. Gates*, 67 id., 165; *Hume v. Scruggs*, 4 Otto, 22; *Moore v. Jones*, 13 Ala., 296; *Holly v. Flournoy*, 54 id., 99. The notes given by the plaintiff were no part of her separate estate; they were void in law, and could not be made a charge on any separate estate she might thereafter acquire; and the only remedy of the payees would be to recover the land by foreclosing the mortgages. *Wooster v. Northrup*, 5 Wis., 245; *Brown v. Hermann*, 14 Abb. Pr., 394. The case of *Feller v. Alden*, 23

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Wis., 301 (holding that the husband's interest could be reached only in equity), if not overruled by *Lyon v. G. B. & M. Railway Co.*, 42 Wis., 548, is still not applicable here, because there it was conceded that the land belonged to the wife. See *Feller v. Alden*, on p. 304; *Robinson v. Wallace*, *supra*.

COLE, J. This is a contest between the plaintiff, a married woman, and her husband's creditor, for certain crops grown upon a farm the title of which is in her. It appears that the plaintiff, having no separate estate, purchased the farm of a third party, paying nothing down, but giving her own note and a mortgage on the premises conveyed, to secure the payment of the purchase money. There is no claim nor pretense that the purchase by the plaintiff was not a perfectly fair, honest, *bona fide* transaction, free from all imputation of fraud, unless the law condemn such a purchase upon credit. The husband of the plaintiff lives with her on the farm, assumes the direction and control of the business so far as relates to the farm labor, but carries on the business in the name of the plaintiff, as her agent, and without any agreement as to his compensation for services rendered. The plaintiff has paid, from the proceeds of the crops raised upon the farm, one year's interest on the purchase money, and, in addition, made a payment of \$200 to apply on the principal; and it is admitted that the crops in question were produced by means of the joint labor and management of the plaintiff and her husband. These are the material facts upon which the question of law arises. Can, then, a married woman, under the laws of this state, who has no separate estate, purchase of a third person, upon credit, a farm; take the title in her own name, and hold it for her own use and not for the use of the husband; carry on the farm by means of the agency of her husband, who is employed by her to manage the business, but without any specific agreement as to his compensation; and hold and retain the crops thus raised as her own? Or do the

crops under such circumstances become liable for the debts of her husband?

The doctrine is elementary, that at common law a married woman had capacity to take real and personal estate, by grant, gift or other conveyance, from any person other than her husband. Equity sustained conveyances to the wife direct from the husband, where the rights of creditors did not intervene. *Putnam v. Bicknell*, 18 Wis., 333; *Pike v. Miles*, 23 Wis., 164; *Hannan v. Oxley*, id., 519. As to the real property, at common law, where no trust was created, the husband took the rents and profits during coverture, or for life where there was issue of the marriage; while as to the wife's personal property, he became the absolute owner providing he reduced it to possession during coverture. But this rule of the common law in respect to the rights of the husband in the property of the wife was changed by statute more than a quarter of a century ago. See chapter 44, Laws of 1850. By this enactment it was provided, that a married woman might hold as her own separate estate any real or personal property belonging to her at the time of her marriage, and might likewise receive, by inheritance, gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, any real or personal property, or interest or estate therein, and the rents, issues and profits thereof, in the same manner and with like effect as if she were unmarried; and the same should not be subject to the disposal of her husband, nor be liable for his debts.

This statute removed many of the disabilities which a married woman was under at the common law, and secured to her the full use and enjoyment of her separate estate. See *Conway v. Smith*, 13 Wis., 125; *Feller v. Alden*, 23 Wis., 301; *Beard v. Dedolf*, 29 Wis., 136; *Hoxie v. Price*, 31 Wis., 82; *Fenslon v. Hogoboom*, id., 172. In *McVey v. Green Bay & Minnesota Railway Co.*, 42 Wis., 532, we had occasion to put a construction on the word "grant" as used in this stat-

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ute; and it was decided that it included a deed of bargain and sale to a married woman, executed by a stranger, and that a married woman, under such a conveyance, might acquire title to land by purchase, and hold it as her separate estate, if it really were such. But in that case no question arose as to the power of a married woman, having no separate estate, to purchase on credit, as in this case; because the court held that, in the absence of all proof upon the subject, the presumption was that the consideration was paid by the grantee when the conveyance was executed. Of course, in all cases where the consideration was in fact paid by the wife out of her separate estate, the purchase was good and valid. Notwithstanding the legislature had thus secured to the wife the full use and enjoyment of her separate estate, and clothed her with power to make legal contracts with respect to it, still her earnings belonged to the husband, unless, either from drunkenness, profligacy or other cause, he neglected or refused to provide for her support. *Stinson v. White*, 20 Wis., 562; *Edson v. Hayden*, id., 683. But by chapter 155, Laws of 1872, the individual earnings of a married woman, except those accruing from labor performed for her husband, are declared to be her separate property, and not subject to her husband's control, nor liable for his debts. This being the state of the statutory law, it follows, and has in fact been so ruled, that a married woman may now carry on business in her own name and for her own benefit; may make valid contracts in respect thereto, which may be enforced at law in actions against her; and may enjoy and have the advantage of all the profits arising from such business, in the same manner as though she were sole. *Meyers v. Rahte*, 46 Wis., 655. If she have a separate estate, it would not be claimed that she could not purchase real or personal property, either for cash or on credit, to use in carrying on trade or business, and increase her profits. Nor will it be denied, if she have no such estate, that she might get or

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acquire property by her labor, skill or talents, and hold and enjoy it as "*earnings*," for so the law declares.

Dr. Webster defines "earnings" to be that which is earned; that which is gained or merited by labor, services or performances; wages or reward. We know that some gifted women acquire or earn large sums of money by their writings or works of art, or by singing or performances on the stage. Others, again, make wealth in carrying on trade, or by sagacious and well directed efforts in some branch of industry. These earnings and profits the law of this state secures to the married woman as her separate property. Now, suppose a married woman is a seamstress, having no estate of her own: may she purchase a sewing-machine by means of which she may increase her earnings and make her labor more profitable? Or if she be a music teacher, may she buy a piano-forte upon which she can give music lessons? Does not the law allow her to buy these things on credit, and acquire a separate estate by her earnings? It seems to us it does. It is but another application of the same principle, to permit her to lease or buy a house upon credit, in which she may keep a private school, or earn money in keeping boarders; or to permit her to buy a farm in the same manner, and raise stock or grain, and thus acquire a separate estate. It is in perfect accord with the spirit of all the legislation in regard to the property rights of married women, to enable her to do these things. It is said that these statutes are remedial in their character; intended to remove the disabilities which the common law attached to married women, and were designed to enable them to have, hold and acquire property which they could call their own, and to earn something for themselves by their skill and labor. They are therefore to be liberally construed to secure the object of their enactment. *McVey v. The Green Bay & Minn. Railway Co.*, *supra*. There can be no doubt that the title to the farm in this case vested in the plaintiff by the conveyance

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made to her, the same as though she antecedently had a separate estate with which to pay the consideration. Now may she not hold and enjoy the proceeds of the farm as her own property? Probably, if she had not used the agency of her husband to carry on the farm and aid in raising the crops, it would not be claimed that he had any interest in them which his creditors could seize upon an execution. But, if the wife is the real owner of the premises, is there any legal objection to her employing her husband as an agent to manage the business for her? There is doubtless more or less reason to suspect the fairness and honesty of such an arrangement, and it should be closely scrutinized to see that it is not a cover for fraud—a mere device to place the husband's property beyond the reach of creditors. But where the purchase by the wife is really *bona fide*, she being the real owner of the property, we do not think the law imputes fraud, or condemns the transaction, from the mere fact that the wife had no separate estate when she made the purchase, and therefore, from necessity, made it wholly on credit.

In *Feller v. Alden*, *supra*, the wife owned land as her separate estate, and cultivated it by means of the agency of her husband and the labor of her minor children. It was held that the legal title to the products and proceeds of the farm was in the married woman, so that they could not be levied on under an execution against her husband. It was said that the wife was at liberty to avail herself of the agency of her husband to manage her separate estate, and still the produce thereof, with the increase of stock, would belong to her. It is suggested on the brief of counsel for defendant, that the doctrine of that case has been overruled by the subsequent decision in *Lyon v. Green Bay & Minn. Railway Co.*, 42 Wis., 548; but that is a mistake. The Lyon case was an action of trespass by the wife for injuries to the grass and crops on her land. This court thought the evidence showed that the husband received the proceeds of the land, and was the real owner of the crops,

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and was the party to bring an action for an injury to them. There is no conflict between the two decisions, as we understand them.

We do not deem it necessary to comment upon the decisions in other states, to which we were cited on the argument, many of which were made under statutes unlike our own.

The question presented is purely one arising upon our own statute, and we feel at liberty to give it that construction which will best meet the object of the legislature in enacting it.

It follows from these views, that the judgment of the circuit court must be reversed, and the cause must be remanded with directions to give judgment for the plaintiff for the return of the property or its value.

By the Court.— So ordered.

PETERSON VS. OLESON, imp.

EQUITY: PARENT AND CHILD: MORTGAGE: RESCISSION: ANNUITY. (1)

Mortgage by son to secure payment of annuity to parent: Remedy for breach. (2) Northampton tables. (3) Allowance for value of future performance of covenanted filial duty. (4) Form of foreclosure judgment in such case: Term of redemption before sale: Future annual payments to be made in cash.

1. A son gave a mortgage of land to secure performance of covenants by which he was bound to furnish his mother, the plaintiff, each year, commencing in 1868, a certain quantity of grain, hay and pasture, and for every second year certain other chattels, etc. On his failure to perform his covenants: *Held*, that as the condition of the mortgage is not the support and maintenance of the plaintiff, but the payment of life annuities in specific articles, the proper remedy is not a rescission of the contract (as in *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 385), but a foreclosure of the mortgage, and sale of the premises to make the amount of damages accrued for past breaches, together with the present value of the annuity which the mortgagor's covenants bind him to pay plaintiff for the remainder of her life.
2. In computing the present value of such annuity, there was no error in

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- using the Northampton tables, in the absence of any statute or rule of court on that subject.
3. By the terms of the mortgagor's covenant, he is also bound to take care of plaintiff during sickness, until her death; and, in a suit to foreclose, the court below included in the judgment a certain sum as the estimated value of such future care.* On appeal of a judgment creditor of the mortgagor, made a defendant to the action: *Held*, that as the covenant was for the performance of a prospective filial duty, the value of which cannot be estimated in money, the allowance of this item was error.
 4. Judgment in such a case should permit a redemption at any time before sale, by payment of the sum actually due for past breaches, including stipulated solicitor's fees, with interest and costs (leaving plaintiff at liberty to apply for a further judgment in case of any future default). And it should direct future annual payments to be made *in cash*, at the cash value of the stipulated payments as determined by the court.

APPEAL from the Circuit Court for *Dane* County.

This is an action to foreclose a mortgage on certain lands in Dane county, executed by the defendant *Ingebretson alias Erdahl* to his father and mother, Ingebret Peterson (now deceased) and the plaintiff. The mortgage was executed in December, 1865, to secure the performance by the mortgagor of the following covenants contained in a bond of even date with the mortgage executed by him to the mortgagees:

"I bind myself, my heirs, executors, administrators and assigns, to furnish to the said *Ann Peterson* and Ingebret Peterson, her husband, on the first day of October of each and every year, thirty bushels of good wheat, five bushels of oats, and one fat hog not to weigh less than two hundred or two hundred and fifty pounds, to be furnished only every other year, commencing on the first day of October, A. D. 1868; and I further bind myself, my heirs, executors, administrator and assigns, as aforesaid, to furnish to the said parties in due season, each and every year as aforesaid, a sufficient quantity of hay and necessary pasture for one cow and three sheep; also to furnish a sufficient quantity of good wood for fuel, cut, hauled and ready for use—the said wood to be furnished only every other year, commencing on the first day of

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October, A. D. 1868; also to furnish to the said parties all necessary store-room for the aforesaid mentioned thirty bushels of wheat and five bushels of oats, during their life-time; and in case the said *Ann* and Ingebret Peterson shall have to build themselves a dwelling-house, then I bind myself and heirs to haul one-half of all the building materials onto the place where the said dwelling-house is to be built, on the land of Peter Ingebretson, in said town of Pleasant Springs, and also to furnish the same parties as aforesaid, at any time during their life-time, team and wagon to go to mill and to bring to market their grain they may have to sell. I further bind myself, my heirs and assigns, in case the said *Ann Peterson* and Ingebret Peterson shall have the above mentioned cow pastured in the pasture of Peter Ingebretson, his heirs or assigns, then I do hereby agree to pasture another cow belonging to the said Peter Ingebretson, his heirs or assigns, so long as the said *Ann* and Ingebret Peterson, or either of them, shall live. I also bind myself, my heirs and assigns, as aforesaid, to aid, assist and take good care of the said *Ann Peterson* and Ingebret Peterson, her husband, during all their sickness until their death, and in case of the death of either of the said parties, the surviving party to have and demand one-half only of the above mentioned provisions, but to have the same right in all other respects with regard to store-room, pasture, hay, and the same quantity of wood for fuel, as when both were living."

It was proved on the trial, and found by the court, that Ingebret Peterson died in March, 1868, and that the plaintiff has never received anything on the annuity secured by the mortgage. It was also proved (but not expressly found) that the plaintiff had frequently demanded of the mortgagor performance, or part performance, of the stipulations in the bond, commencing soon after a payment first became due.

The court ascertained the value of the several articles to be delivered pursuant to the contract, at the average value thereof

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for ten years as proved on the trial, reducing the biennial to annual payments, for convenience of computation, and stated the value of the annuity as follows:

" 15 bushels of wheat @ 99c.....	\$14 85
2½ bushels of wheat @ 31c.....	77
Keeping one cow (hay and pasturage) per year.....	20 00
Keeping three sheep (hay and pasturage) per year.....	10 00
7 cords of wood @ \$4.50.....	31 50
Chopping 7 cords of wood, and getting ready for use, @ \$1.00	7 00
Milling and other hauling per year	2 00
Pork, average amount 56¼ lbs., @ 6c. per lb.....	3 37
<hr/>	
Making the value of the provision as an annuity, due Oc- tober 1, 1868, a sum equal to.....	<u>\$89 49"</u>

Simple interest at 7 per cent. was computed on each annuity from the time it became due to the date of judgment.

Finding that the mortgaged premises could not properly be sold in parcels, the court also ascertained the present value of payments thereafter to become due, using the Northampton tables to fix the probable duration of plaintiff's life. The court gave judgment for the aggregate amount of the payments and interest due, and the present value of the annuity, as thus ascertained, together with \$100 solicitor's fees stipulated in the mortgage, and \$100 for the probable value of the care and assistance in sickness, stipulated for in the bond. The judgment provides for a redemption on payment of such aggregate amount, with interest and costs, at any time before sale of the mortgaged premises, which is adjudged in the usual form.

The defendant *Oleson*, who was a judgment creditor of the mortgagor, and had a lien upon his interest in the mortgaged premises, appealed from the judgment.

For the appellant, there was a brief by *Keyes & Chynoweth*, and oral argument by *Mr. Chynoweth*. They contended, among other things,¹ 1. That the instrument, in the form

¹ Although there does not appear to have been any real controversy between the parties upon the point whether the principal defendant's rights were those

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of a mortgage executed by the defendant *Erdahl* to the plaintiff and her former husband was a mortgage in fact and in law, notwithstanding the special character of the conditions therein expressed. *Lanfair v. Lanfair*, 18 Pick., 299; *Fiske v. Fiske*, 20 id., 499; *Marsh v. Austin*, 1 Allen, 235; *Gilson v. Gilson*, 2 id., 115; *Bryant v. Erskine*, 55 Me., 153 (modifying some previous cases in that court so far as concerns the necessity of the mortgagee's consent to an assignment); *Wilson v. Wilson*, 38 Me., 18; *Bethlehem v. Annis*, 40 N. H., 34; *Eastman v. Batchelder*, 36 id., 141; *Flanders v. Lamphear*, 9 id., 201; *Austin v. Austin*, 9 Vt., 420; *Henry v. Tupper*, 29 id., 358; *Page v. Green*, 6 Conn., 338; *Stoughton v. Pasco*, 5 id., 442; *Chase v. Peck*, 21 N. Y.,

of a mortgagor, it has been thought best to give the authorities cited for the appellant on that point. Those parts of the bond and mortgage given by *Erdahl*, upon which it was supposed that the question might arise, and which are not included in the text, are here added.

The bond recites the execution to the obligor of the deed of conveyance made by Ingebret Peterson and *Ann Peterson*, and states that in consideration thereof the said obligor is "held and firmly bound, *under penalty of annulling and making void said conveyance*," to perform his undertakings in said bond. After stating these as they are above set forth in the text, the instrument adds: "And it is further agreed and understood that each of the aforementioned undertakings and agreements shall run with the land as covenants to be by me, my heirs or assigns, performed as conditions precedent to an absolute title in fee simple, and the possession of said store-rooms for grain and the pasture for one cow and three sheep shall for all practical purposes be considered as possession of the whole; it being the true intent and understanding of these presents, that the said Lars Ingebretson shall not have a right to encumber said land in any manner whatever, but shall have the right by deed of quitclaim to transfer his interest in the same, subject to the agreements above enumerated, while the title in fee simple shall become absolute in the said Lars Ingebretson, his heirs or assigns, on the death of said *Ann Peterson* and Ingebret Peterson, her husband, anything in the said deed of conveyance this day executed as aforesaid to the contrary notwithstanding."

The mortgage is conditioned for the performance by the mortgagor of the undertakings and agreements of the bond, and contains a power of sale.

The deed of conveyance, bond and mortgage seem to have been executed contemporaneously.

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581; *Ackla v. Ackla*, 6 Barr, 228; *Daniels v. Eisenlord*, 10 Mich., 454; *Tucker v. Tucker*, 24 id., 426; *Randall v. Phillips*, 3 Mason (U. S. C. C.), 378; 1 Hilliard on Mort., 120; 1 Jones on Mort., 389; 2 Greenl. Cruise, 80, n. In this connection counsel contended that the question of *certainly of compensation* on default, in this class of mortgages, was hardly an open one; and they criticised a remark in *Berrinkott v. Traphagen*, 39 Wis., 227, to the effect that the *gross value* of the annuity was "not measurable by any exact pecuniary standard," citing in a contrary sense *Wright v. Young*, 6 Wis., 127; *Schell v. Plumb*, 55 N. Y., 592; *Jackson v. Edwards*, 7 Paige, 408; *Wager v. Schuyler*, 1 Wend., 553; *Runnells v. Webber*, 59 Me., 488; *Unger v. Leiter*, 32 Ohio St., ; *Terry's Ex'r v. Drabenstadt*, 68 Pa. St., 400; *Rowley v. L. & N. W. Railway Co.*, L. R., 8 Exch. Cas., 221; as well as *Austin v. Austin* and others of the cases cited *supra*.

2. That if the instrument was a mortgage in its *inception*, then it is still a mortgage, according to the maxim, "Once a mortgage always a mortgage" (1 Powell on Mort., 116, 117, note 7, 127); and the right to redeem remains until foreclosed in the manner required by the statute. In this connection counsel criticised the decision in *Bresnahan v. Bresnahan*, 46 Wis., 385, as appearing to proceed upon the idea that an instrument acknowledged to have been a mortgage in its inception, could become an absolute conveyance by a subsequent default of the mortgagor; and they contended that it has been the settled doctrine of this state for more than a quarter of a century that the legal title remains in the mortgagor, and does not pass from him by default, but only upon a foreclosure and sale. *Gillett v. Eaton*, 6 Wis., 30; *Tallman v. Ely*, id., 244; *Wood v. Trask*, 7 id., 566; *Hennesy v. Farrell*, 20 id., 42 (which involved a mortgage and bond for support); *Brinkman v. Jones*, 44 id., 510; *Russell v. Ely*, 2 Black, U. S., 575. They further argued that the right of redemption is a vested right in the mortgagor from the inception of the mortgage, and cannot be

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cut off even by contract between the parties relating to a future contingency (*Quartermous v. Kennedy*, 29 Ark., 544; *Wing v. Cooper*, 37 Vt., 169; *Davis v. Hemenway*, 27 id., 589; *Austin v. Austin*, *supra*; *Rogan v. Walker*, 1 Wis., 578; *Smith v. Hoyt*, 14 id., 257; *Sage v. McLaughlin*, 34 id., 550; *Walker v. Gulliford*, 36 id., 325); that for breach of a mortgage the remedy provided by statute is exclusive (*Noyes v. Sturdivant*, 6 Shep., 104; 2 Jones on Mort., sec. 1317); that the only case cited to sustain *Bresnahan v. Bresnahan* is *Bogie v. Bogie*, 41 Wis., 209, in which there was no question of a mortgage at all, but an absolute conveyance from the party to be supported was rescinded; that the same was true in *Jenkins v. Jenkins*, 3 Mon. (Ky.), 327, *Scott's Heirs v. Scott*, 3 B. Mon., 2, and *Leach v. Leach*, 4 Porter (Ind.), 628, which were also decided in states where, at the time of the decisions, the legal title passed to the mortgagee, and no right of redemption was recognized; and that *Reid v. Burns*, 13 Ohio St., 49, on which *Bogie v. Bogie* seems to rest, was also decided in a state where the right of redemption from a mortgage is unknown. 3. That one seeking rescission of a contract for a breach thereof must at least move on the first knowledge of such breach (*Willard's Eq. Jur.*, 292; *Powell v. Hankey*, 2 P. Wms., 82; *King v. Hamilton*, 4 Pet., 311, 329; *Pratt v. Carroll*, 8 Cranch, 471; *McKay v. Carrington*, 1 McLean, 50; *Brashier v. Gratz*, 6 Wheat., 528; *Atlantic Delaine Co. v. James*, 94 U. S., 207; *Willard v. Henry*, 2 N. H., 120; *Lawrence v. Dale*, 3 Johns. Ch., 23; *Lewis v. Carstairs*, 5 Watts & Serg., 209; *Martin v. Ives*, 17 S. & R., 366; *Ackla v. Ackla*, 6 Barr, 228; *Ayres v. Mitchell*, 3 Sm. & M., 683; *Brown v. Peck*, 2 Wis., 281); and that where a lien intervenes between the breach and the suit instituted thereon, the decree reverts the title, not as of the time of the breach, but as of the time of the decree. *Henderson v. Hunton*, 26 Gratt., 926; *Fripp v. Talbird*, 1 Hill (S. C.) Ch., 142; *Backhouse's Adm'r v. Jett's Adm'r*, 1 Brock., 500; *Pearsoll v. Chapin*, 44 Pa. St., 9, 15; *Austin v.*

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Austin, 9 Vt., 420; *Hogeboom v. Hall*, 24 Wend., 146. 4. That if defendant was entitled to redeem, the terms of redemption fixed by the judgment were erroneous. (1) The determination of the present value of the future annuity is erroneous, because, though the annuitant testified that she was in good health, there was no evidence as to her *constitutional vigor* or *habits* (*Schell v. Plumb*, 55 N. Y., 599; *Unger v. Leiter*, 32 Ohio St.,); and also because the calculation was made by the use (against objection) of the Northampton tables, instead of the testimony of living experts. *City of Ripon v. Bittel*, 30 Wis., 619. (2) The allowance of interest on arrears of the annuity (which was in specific articles) was error. *Philips v. Williams*, 5 Gratt., 259; *Adams v. Adams*, 10 Leigh, 527; *Sprague v. Sprague's Estate*, 30 Vt., 483. (3) It was error to allow \$100 for the present value of future care and attendance in sickness, there being neither averment nor proof upon which such an allowance could be calculated. The action being not merely upon the bond, but also to foreclose the mortgage, each future annuity should be treated as an installment, and the judgment should provide for its future payment as such (*Tucker v. Tucker*, 24 Mich., 426), and should provide for a stay of proceedings upon defendant's bringing into court the amount now actually due, with interest and costs. *Sauer v. Steinbauer*, 10 Wis., 370; R. S., sec. 3157.

For the respondent, there was a brief by *Bashford & Spilde*, and oral argument by *Mr. Spilde*:

In *Berrinkott v. Traphagen*, 39 Wis., 219, the court were unanimous in the opinion that an annuitant's measure of damages upon a forfeiture was the gross value of the bond, *i. e.*, the annuities in arrears, with interest, and the present value of the prospective annuities according to approved life tables. The fact that there was an option clause in the bond in that case, in no way affected the opinion. The court was divided as to whether the sum named in the bond, to which the option clause related, should be treated as penalty or as

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liquidated damages. Had it been treated as penalty, it is clear that the option clause could not have operated to give the obligee anything more than compensatory damages. It is clear that in the case of a bond for support nothing less than the whole value of the provision will compensate the obligee upon a breach. This court has even gone farther in *Bogie v. Bogie*, 41 Wis., 209, and held that equity would rescind the conveyance; but that is not asked here. Again, the judgment should not be reversed because it includes the present value of prospective annual payments, unless there was error in decreeing a sale of the whole mortgaged premises. Under our statute (R. S. 1858, ch. 145, sec. 9; R. S. 1878, sec. 3160), if the premises cannot be advantageously sold in parcels, the court may direct a sale of the whole and payment of the sum due, and also of sums to become due, deducting interest; and that is what this judgment provides.

The respondent's counsel also argued other questions raised by the record.

LYON, J. The bond which the mortgage was given to secure, is not conditional for the support and maintenance of the mortgagees, but for the payment of life annuities in specific articles. The learned counsel for both parties seem to agree that foreclosure of the mortgage and sale of the mortgaged premises is the proper remedy, and not rescission of the contract, as in *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 385. We concur in this view.

The court found, substantially, that the mortgaged premises cannot be sold in parcels without injury to the parties interested, and proceeded to ascertain the present money value of the plaintiff's life annuity, using for that purpose the Northampton tables. These tables are adopted in the new circuit court rules, and we think they were properly used in the present case, in the absence of any rule on the subject. Nothing inconsistent with this was said in *Berrinkott v. Traphagen*,

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39 Wis., 219, although it was there suggested that perhaps life tables prepared at a later time might give the average probable duration of life in this country with more accuracy than it is given in the Northampton tables.

We find certain errors in the accounting and judgment, which must be corrected:

1. The wood was due but once in two years, and the accounting makes it due annually. The mortgagor is charged \$38.50 annually for wood and cutting it, whereas he should only be charged one-half that sum. It was conceded on the argument that this correction should be made. We find no other error in the amount of the annuity. The annuity is therefore \$69.74 instead of \$69.49. The interest on the payment overdue will be correspondingly reduced, as will also the present value of the annuity.

2. The item of \$100, allowed prospectively for care and attendance in sickness, must be stricken out. That is a stipulation for the performance of a filial duty, the value of which it is quite impossible to estimate prospectively in dollars and cents.

3. The judgment should permit a redemption by the payment of a sum actually due on the bond, with solicitor's fees, interest and costs, at any time before sale; leaving the plaintiff at liberty to apply for a further judgment in case of any future default. For the purposes of future payments, the annuity will be \$69.74, payable in cash.

In all other respects, we think the accounting and judgment are correct.

By the Court.—The judgment is reversed, with costs, and the cause will be remanded with directions to the circuit court to render judgment for the plaintiff as above indicated.

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ANDREWS vs. WELCH, imp.

FORECLOSURE SALE: *At what time it may be made.*

Under section 3162, R. S., a foreclosure sale of land cannot be made within a year from the date at which the judgment, as formally entered by the court through its clerk, is rendered perfect so as to show the total amount which must be paid in order to redeem, including not only the principal and interest of the mortgaged debt, but also the *costs taxed*.

APPEAL from the Circuit Court for *Sauk* County.

Foreclosure of a mortgage. The defendant *Welch* appealed from an order refusing to stay the sale of the premises upon the judgment. The ground upon which the stay was sought will appear from the opinion.

For the appellant, there was a brief by *Noyes Bros.*, and oral argument by *Rolla E. Noyes*.

For the respondent, there was a brief by *Levi Crouch* and *Lewis, Lewis & Hale*, and oral argument by *H. M. Lewis*. They contended that ch. 135, R. S., wherever it speaks of a judgment, or of rendering a judgment, means a judgment as defined by sec. 2882, and by the common law, *i. e.*, "the final determination of the rights of the parties" (*Freeman on Judgm.*, 2d ed., sec. 2); that the rendering of a judgment is a strictly judicial act, and its *entry* a merely ministerial act, and the validity of the judgment of the court does not depend upon its being recorded in time by the clerk, the record not being the judgment, but only the evidence of it (*Freeman*, secs. 37-39; *Matthews v. Houghton*, 11 Me., 377; *Fish v. Emerson*, 44 N. Y., 376; *Davis v. Shaver*, 1 Phill. Law (N. C.), 18; *McKinley v. Weber*, 37 Wis., 279; *Ottillie v. Wächter*, 33 id., 252); that *Cord v. Southwell*, 15 Wis., 211, *Bonesteel v. Bonesteel*, 30 id., 151, and *Smith v. Hart*, 44 id., 230, construe the language of a statute which required appeals to be taken within two years from the "*entry* of judgment," and are inapplicable here; and that if that statute had substituted the words "date

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of judgment" or "rendition of judgment," the time to appeal would have commenced running from the time when the judgment of the court was announced. Freeman, sec. 40; *Genella v. Relyea*, 32 Cal., 159.

TAYLOR, J. This is an appeal by the defendant *Welch* from an order denying his motion for an order staying the sale of the mortgaged premises under the judgment rendered in this action. The only question to be determined upon this appeal is, whether the respondent's notice of the sale was premature.

The action was tried by the court, without a jury, at the March term, 1878. The findings of the court were dated April 5th, and filed July 12, 1878, and on the day last named a judgment was filed in the usual form, directing the sale of the mortgaged premises, except that there was a blank left in said judgment for the insertion of the costs of the plaintiff in the action. The costs were, in fact, taxed on the 14th of April, 1879, and then inserted in said judgment; and thereupon the plaintiff caused said mortgaged premises to be advertised for sale, by virtue of said judgment, on the 24th of May, 1879.

Section 3162, R. S. 1876, prescribes the form of the judgment to be rendered in an action to foreclose a mortgage, as follows: "In all such actions, if the plaintiff shall recover, the judgment shall fix the amount of the mortgage debt then due, and also the amount of each installment thereafter to grow due, and the several times when they will become so due, and shall adjudge that the mortgaged premises be sold for the payment of the amount adjudged to be then due, and of all installments which shall thereafter grow due before the sale, or so much thereof as may be sufficient to pay such amount for principal, interest and costs, including costs of sale; and, when demanded in the complaint, an order directing that judgment be rendered for any deficiency against the parties personally liable therefor." Then follows the following provision as to sale: "But no such sale shall be made until the expiration of

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one year from date of such judgment or order of sale; and when judgment is for installments due and to grow due, and payment shall be made within the year of the installments found due at the date of the judgment, with interest and costs, no sale shall be made upon any installment growing due after the date of the judgment, until the expiration of one year after the same shall become due."

We have no hesitation in holding that the judgment referred to in this section is the formal entry of the judgment by the court through its clerk, and not the making and filing of the findings of fact and conclusions of law required to be made and filed by the judge before whom the action is tried. The judgment here referred to is the same judgment which, by the provisions of section 2897, R. S. 1878, the clerk is required to enter in the judgment book.

Section 2863, which prescribes that when the action is tried by the court its decision shall be given in writing and filed with the clerk within twenty days after the court at which the trial took place, very clearly distinguishes this decision from the judgment in the action. The section expressly says: "Judgment upon the decision shall be entered accordingly as of the term at which the cause was tried." The findings of the court amount to nothing more than an order for judgment, and are not in themselves the judgment of the court. *Sage v. McLaughlin*, 34 Wis., 550, 557; *Dean v. Williams*, 2 Pin., 91; *Lincoln v. Cross*, 11 Wis., 94; *Potter v. Eaton*, 26 Wis., 382; *Massing v. Ames*, 36 Wis., 409.

The statutes, in speaking of the decision and findings of a court in a case tried without a jury, never speak of them as the judgment in the action, but as something precedent to such judgment; and these findings, both as to the facts and conclusions of law, must be excepted to by the party seeking to take any advantage of errors in the same, otherwise they are conclusive against him. If, however, the findings are the judgment, then no exceptions ought to be required. It is the

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universal practice that errors appearing in the final judgment need not be excepted to in order to take advantage of them upon appeal or writ of error. This court has held that if the judgment rendered is not sustained by the findings of fact, it will be reversed, though no exceptions be taken to such findings. If the findings are in fact the judgment, it would be difficult to find a reason for reversing a judgment, in such case. *Blossom v. Ferguson*, 13 Wis., 75, and cases cited in head note; *Westfield v. Sauk Co.*, 18 Wis., 624; *Wisconsin River Improvement Co. v. Lyons*, 30 Wis., 61.

Having come to the conclusion that the judgment spoken of in said section 3162 is the same judgment which is required to be entered in the judgment book by section 2897, we think it follows that the date of the entry of such judgment must be the date from which the year begins to run, and within which a sale of the mortgaged premises is prohibited by the provisions of said section 3162. The judgment which was in fact drawn up and entered by the clerk, and which did not contain the amount of costs which the plaintiff was entitled to recover, was not in fact so drawn up or entered until the 12th of July, 1878; and if the year commenced running from that date, the notice of sale and threatened sale were premature, and should have been stayed. In view of the object of the statute, we think it must be held that the year does not commence to run against a party entitled to redeem the mortgaged premises, until the judgment is perfected by the insertion therein of the amount of the costs of the plaintiff. Until that is done, the party entitled to redeem has no means of knowing what amount he must pay to the plaintiff or clerk in order to redeem the premises under the provisions of section 3165, R. S. 1878. It is no answer to this proposition to say that the party wishing to redeem may compel the plaintiff to have his costs taxed and inserted in the judgment. It is the duty of the party claiming the costs to have the same adjusted and inserted.

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The costs are a part of the plaintiff's judgment, and it is just as necessary to the defendant's rights that they should be adjusted, and the amount fixed by the judgment, as it is that the amount due upon the debt secured by the mortgage should be ascertained and fixed thereby.

Under the old practice of selling the mortgaged premises immediately upon the rendition of the judgment, it was the universal practice to have the costs adjusted and inserted in the judgment before sale. The new law was intended, as we think, to secure to the mortgagor or his assigns one year to redeem the mortgaged premises, after a judgment has been perfected in such manner as to fix the exact amount which he must pay for the debt secured by the mortgage, with interest and costs, in order to redeem the sale from the effect of the judgment, and prevent a sale thereunder. This court has held that the time does not begin to run which limits the time for settling a bill of exceptions to sixty days after the entry of judgment, until the judgment is made perfect by the insertion of the amount of costs recovered. *Cord v. Southwell*, 15 Wis., 211; *Bonesteel v. Bonesteel*, 30 Wis., 151. It is also held that the judgment is not perfect so as to enable the party complaining of the same to appeal therefrom, until the costs have been taxed and inserted therein. *Smith v. Hart*, 44 Wis., 230.

These decisions do not depend upon the fact that the statute which governed them speaks of "the entry of judgment," not of its rendition; but upon the fact that there is no final perfected judgment fixing the exact rights of the parties, and that therefore, in the one case, the sixty days within which a bill of exceptions might be settled did not begin to run until the costs were entered in the judgment, and in the other there was not in fact a final judgment from which an appeal would lie until such costs were so inserted. In those cases it does not appear but that judgment had been in fact entered by the clerk, as in the case at bar, with a blank for the insertion of the costs.

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The cases in New York, which this court has followed, all proceed upon the ground that the judgment is not a perfect judgment until the costs are inserted therein, and that it is therefore premature to appeal therefrom until the same is perfected by their insertion. *McMahon v. Harrison*, 5 How. Pr., 360; *Lentilhon v. City of New York*, 3 Sandf., S. C., 721.

There is no hardship or inconvenience in requiring the plaintiff in a foreclosure action to perfect his judgment by the taxation and insertion of his costs in the judgment, in order to bar the mortgagor or his assigns from redeeming the same under section 3165; and it would be a hardship and inconvenience to compel the party seeking to redeem to come into court in order to compel the mortgagee to settle and adjust the amount which he may demand for such redemption. It is the judgment of the court which must fix that amount, unless the parties see fit to agree upon it without the intervention of such judgment; and the plaintiff must see to it that he has that amount fixed by the court, before he can coërcé a redemption, or sell the mortgaged property to pay the same.

By the Court.—The order of the circuit court is reversed, with costs, with directions to grant the order staying the sale of the mortgaged premises.

McGINNISS vs. POMEROY and others.

APPEAL from the Circuit Court for *Marquette County*.

Brief for the appellant by *John Brickwell* and *Harvey Briggs*, and oral argument by *Mr. Briggs* and *G. B. Smith*.
T. L. Kennan, for the respondents.

ORON, J. This cause was, by consent of parties, argued and submitted as if a bill of exceptions, upon which the several alleged errors appeared, were on file and a part of the record, when in fact no bill of exceptions had as yet been

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returned; the learned counsel of the appellant suggesting that the return of the clerk of the circuit court was imperfect in this respect, and taking a rule upon the clerk to amend his return by transmitting to this court such bill of exceptions. The clerk has since returned that no bill of exceptions in this case was ever on file in his office.

We have, however, considered the questions raised, in anticipation of such amended return, and find no error in the rulings of the circuit court or in the record.

By the Court.—The judgment of the circuit court is affirmed, with costs.

DITBERNER VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY.

RAILROADS: CONSTITUTIONAL LAW. (1) *Statute making railroad company liable for injuries to employee, held valid.*

NEGLECT. (2, 3) *When a question for the jury.* (4) *"Slight negligence."*

1. Ch. 173 of 1875 (which makes each railroad company of this state liable for damages sustained by any agent or employee thereof, while in the line of his duty as such, caused by the negligence of any other agent or employee of such company in respect to his duty as such, where the negligence of the person so injured does not materially contribute to the result), is valid, although it does not impose a similar liability upon other corporations or persons.
2. Plaintiff was employed as a section hand to work about defendant's depot yard in a city, and, while he was engaged, under direction of defendant's foreman, in driving a spike to hold a rail on one of the tracks in the yard, an engine, used in the yard to make up trains, backed cars along the track on which he was at work with his back toward the train, and struck and injured him. The special verdict was, that plaintiff knew, when driving the spike, that the switch-engine was switching cars and making up trains in the yard, and was liable to be run on any track, but did not know that the cars were being put on the track upon which he was at work; that it was the custom for the engineer to ring the bell on the switch-engine when it was in motion; that the bell was rung, and

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heard by the plaintiff five minutes before he was injured, as the engine passed along a side track to his rear, but was not rung after the engine commenced backing toward him; that he had no reason to assume that it would not be run on the track where he was at work; that it was necessary for plaintiff, when driving the spike, to stand with his back to the approaching train; that, when taking that position, he did not look or listen for the train; and that if he had done so, he might have avoided the injury. The jury further found that the engineer of the switch-engine was negligent in not ringing the bell when backing his train towards the plaintiff; that such negligence caused the injury; and that, under all the circumstances, plaintiff was not guilty of any want of ordinary care. *Held*, that the court cannot say, as matter of law, that plaintiff was guilty of negligence in relying upon the custom as to ringing the bell, and so failing, under the circumstances, to look or listen for the cars; and the question of contributory negligence was therefore properly submitted to the jury.

3. It was also for the jury to determine whether the failure of the engineer to ring the bell while backing cars toward the plaintiff, was negligence.
4. It is the settled law of this state, that while a slight want of ordinary care on plaintiff's part will defeat such an action as this, it will not be defeated by "slight negligence" on his part; that phrase properly denoting a want of *extraordinary* care.

APPEAL from the Circuit Court for *Columbia* County.

The plaintiff was a section hand employed by the defendant railway company to work about its depot yard at Portage City. The yard is traversed by several tracks. While plaintiff was engaged, under the direction of his foreman, in driving a spike to hold a rail of one of the tracks in such yard, an engine of the defendant, used in the yard to make up trains, backed cars along the track on which the plaintiff was at work with his back towards the train, and struck and injured him. This action was brought to recover damages for such injuries. The complaint charges that the injuries were caused by the negligence of defendant's servants and employees, in failing to ring the bell on the engine (known as a switch engine), or to give any signal of the approach of the train to the place where plaintiff was at work. The answer denies that defendant's servants were negligent, and alleges that plaintiff's injuries were the result of his own negligence.

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The jury found specially that plaintiff knew when driving the spike that the switch-engine was switching cars and making up trains in the yard, and was liable to be run on any track, but did not know that cars were being put on the track upon which he was at work; that it was the custom and usage for the engineer to ring the bell on the switch-engine whenever the engine was in motion; that the bell was rung and heard by the plaintiff five minutes before he was injured, as the engine passed along a side-track to his rear, but was not rung after the engine commenced backing towards the plaintiff; that plaintiff had no reason to assume that it would not be run on the track where he was at work; and that it was necessary for the plaintiff, when driving the spike, to stand with his back to the approaching train, but that when taking such position he did not look or listen therefor, although had he done so he could have avoided the injuries.

The jury further found that, under all of the circumstances proved, the plaintiff was not guilty of any want of ordinary care which contributed to his injuries, but that the engineer in charge of the switch-engine was negligent in not ringing the bell when he was backing his train towards the plaintiff, and that such negligence caused the injuries complained of.

The court denied motions on behalf of the defendant for judgment in its favor on the special verdict and for a new trial, and gave judgment for the plaintiff for the damages assessed by the jury. The defendant appealed.

Melbert B. Cary, for appellant, contended that ch. 173 of 1875 is void because in violation of that principle of constitutional law which prohibits unequal and partial legislation upon general subjects. *Cooley's Con. Lim.*, 389-394; *Wally's Heirs v. Kennedy*, 2 Yerg., 564; *Durham v. Lewiston*, 4 Greenl., 140; *Holden v. James*, 11 Mass., 396; *Piquet's Case*, 5 Pick., 64; *Budd v. The State*, 3 Humph., 483; *Deppe v. Railway Co.*, 36 Iowa, 52; *Schrøder v. Railway Co.*, 41 id., 344; *Durkee v. Janesville*, 28 Wis., 464; *Bull v. Conroe*, 13

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id., 238-244. He also discussed other questions raised by the record.

T. L. Kennan, for respondent.

Lrox, J. 1. The learned counsel for the defendant maintains that the statute under which this action was brought (chapter 173, Laws of 1875), is unconstitutional and void. The statute is as follows: "Every railroad company operating any railroad or railway, the line of which shall be situated in whole or in part in this state, shall be liable for all damages sustained within this state by any employee, servant or agent of such company, while in the line of his duty as such, and which shall have been caused by the carelessness or negligence of any other agent, employee or servant of such company, in the discharge of, or for failing to discharge, their proper duties as such; but this act shall not be construed so as to permit a recovery where the negligence of the person so claiming to recover materially contributed to the result complained of."

It is claimed that this statute violates that principle of constitutional law which prohibits unequal and partial legislation on general subjects, and is therefore void. It is conceded that the act would be a valid exercise of legislative power were its provisions restricted to cases of injury caused by the negligent operation of railways. But it is assumed that the statute is not so restricted; that by its terms it seeks to make a railway company liable for an injury to an employee caused by the negligence of another employee, although the negligent act may have no connection with the operation of the railway of the company. The argument is, that because the same liability is not imposed upon other corporations, the statute is void within the rule of *Durkee v. Janesville*, 28 Wis., 464.

Iowa cases have been cited which seem to assert the doctrine contended for. The statute of that state under which those cases were decided, corresponding with our chapter 173 of 1875, limits a recovery to cases where the injuries were

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caused by the negligent operation of railways. In view of that limitation, the assertion of the above doctrine in those cases seems to be *obiter*. It was unnecessary that the court should determine what its ruling would be were a different statute under consideration, or to rule upon a hypothetical statute. We entertain the highest respect for that learned and very able court, and can usually approve its judgments, but are unable to agree with it on this subject. Yet we concur in the judgments of that court in these very cases. We only reject the views stated *arguendo*, and which did not influence or affect the judgments.

The cases of *Attorney General v. The Railroad Companies*, 35 Wis., 425, decide the question under consideration adversely to the position maintained by the learned counsel for the railway company. It was held in those cases that a statute which limited the rates to be charged by railway companies for fares and freights was a valid enactment, although such limitations were not imposed upon other common carriers, whether corporate or individual. The statute was held to be a proper exercise by the legislature of the power granted to it by the constitution to alter or repeal the charters of those corporations. Const., art. XI, sec. 1. The same principle is involved in this case. If the legislature can impose limitations and restrictions upon railway companies not imposed upon other common carriers, whether corporate or otherwise, it may in like manner impose liabilities upon such companies from which other common carriers and other corporations are exempt.

The discussion by the chief justice in the cases above cited, of the constitutional power of the legislature over corporations and their charters, is so full and satisfactory that nothing can profitably be added to it. It must be held that chapter 173 of 1873 is a valid enactment.

2. The next question to be determined is, whether the special findings sustain the judgment.

The jury found that it was the custom and usage for the

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engineer of the switch engine to ring the bell when his engine was in motion in the depot yard; that he failed to do so when moving towards the plaintiff on the track where he was at work when injured; and that the failure to ring the bell caused the accident, and was negligence. The findings establish the negligence of the defendant's employee, the engineer.

The jury also found that the plaintiff knew the switch engine was being used in the yard, and was liable to be run on the track where he was at work; and that he failed to look or listen for its approach, although had he done so he could have escaped injury. It is said that these findings show negligence on his part, notwithstanding the jury found that he was not negligent.

Under the rule of *Schultz v. Railway Co.*, 44 Wis., 638, we think the question of the alleged contributory negligence of the plaintiff was properly submitted to the jury, and that the finding in that behalf cannot be disturbed. The facts of that case are somewhat like the facts of this case. It is there said: "The plaintiff had the right, without being chargeable with negligence, to act on the presumption that the bell of the engine would be rung before the cars were moved." So in this case we think the plaintiff might rely upon the bell being rung when the engine was in motion, without being guilty of negligence; that is, we cannot say, as matter of law, that he is chargeable with negligence because he failed to look or listen for the approaching engine and cars. The true position is, we think, that such failure was a fact to be considered by the jury, and it was for the jury to determine whether it was or was not negligence. That is the meaning of the language quoted above from the opinion in *Schultz v. Railway Co.* We conclude that the special findings support the judgment.

3. We find no error in the instructions which the court gave to the jury, or in the refusal to instruct them as asked on behalf of the defendant.

The court refused to instruct the jury that if, within

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two or three minutes before the accident, the plaintiff heard the bell and knew the engine was moving to and fro through the yard, making up a train, that was sufficient notice to the plaintiff, and as to him it was not negligence if the bell was not sounded at the minute he was struck. We think it was for the jury to say whether, under all the circumstances of the case in proof, the failure to ring the bell was negligence or not, and that the proposed instruction was properly refused.

An instruction submitting to the jury the whole question of negligence — whether on the part of the plaintiff or the engineer — was given. It has already been said that this was a proper question to be thus submitted.

The only remaining exception was to an instruction that "slight negligence on the part of the plaintiff will not defeat his right to recover." That is the settled law of this court. Slight want of ordinary care by the plaintiff in a case like this is fatal to a recovery, but slight negligence (which is the want of extraordinary care) will not defeat the action. *Griffin v. The Town of Willow*, 43 Wis., 509, and cases cited.

By the Court. — The judgment of the circuit court is affirmed.

KEARNEY, Administrator, vs. THE CHICAGO, MILWAUKEE & ST.
PAUL RAILWAY COMPANY.

RAILROADS: CONTRIBUTORY NEGLIGENCE. *Two findings of special verdict held inconsistent.*

M., a young and vigorous man, whose sight and hearing were sound and unimpaired, being at a point about 253 feet west of a railroad, in a village, and having his horses hitched on the same street about 225 feet east of the railroad, heard the long whistle of an approaching locomotive engine, and immediately commenced running down the street towards his horses. At that time the train was about half a mile distant from the street crossing, and it whistled again when about a quarter of a mile distant; it was hidden from M.'s sight until he was within about twenty

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feet of the track, when he might have seen it by looking in that direction; and, being a light special train, it was running about forty miles per hour, and without ringing the bell on its approach. The passenger trains of the company usually run at the rate of twenty miles, and its freight trains at the rate of twelve miles per hour; and a freight train was due near that time. M. did not cease running, or diminish his speed, until he was in the act of stepping on the first rail of the main track, when he was struck by the train and killed — the whistle for the brakes being sounded at the same moment. The jury, by special verdict, found that M., after hearing the whistle and the noise of the train, and seeing it, attempted to cross the track in front of the locomotive; that if he had stopped just before going upon the land included within defendant's right of way, and looked in the proper direction, he could have seen the train; and that he was not guilty of any want of ordinary care in running upon the track as he did. *Held*, that, in view of the evidence, these findings are *inconsistent*, and it was error to refuse a new trial.

TAYLOR, J., dissented.

APPEAL from the Circuit Court for *Columbia* County.

Action for injuries to the plaintiff's intestate resulting in his death, alleged to have been caused by defendant's negligence. The facts in evidence will sufficiently appear from the opinions of Justices COLE and TAYLOR. Plaintiff had a verdict and judgment; and defendant appealed.

Melbert B. Cary, for the appellant.

T. L. Kennan, for the respondent.

COLE, J. With but little change, the language of the chief justice in *Haas v. The Chicago & Northwestern Railway Co.*, 41 Wis., 44, so accurately and properly applies to the questions in this case, that I cannot do better than to quote it. Here, as there, the evidence is abundant to warrant the finding that those in charge of the train on the defendant's road were guilty of a want of ordinary care in running at such an unusual and dangerous speed into the village of Rio. The excuse offered for this act — that it was necessary for the superintendent of the road to immediately reach the Wisconsin river at Kilbourn City, to examine into the safety of the bridge at that point —

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in some degree extenuates, but does not fully justify, the fault, in view of the limited precautions taken to guard against injuries to persons crossing the track. But, while this is so, we observe here, as was remarked there, that "the evidence on both sides tended strongly to show contributory negligence on the part of the deceased. The cause will probably be tried again, and new evidence may vary or qualify the facts. We therefore refrain from ruling, on this appeal, whether or not the evidence appears to us sufficient to establish contributory negligence as a matter of law for the court."

It appears that the deceased, William Miller, on the 12th day of April, 1877, drove from his farm to the village of Rio, about one and a half miles distant, hitched his team in Rio street, in front of Ulrich's hotel, on the west side of the railroad, about 225 feet from where the track of defendant's road crosses the highway, and left them there. Shortly afterwards, and about the middle of the forenoon, Miller was in the office of Fosgate's hotel, situated on the same highway, but on the other side of the railroad track, and distant therefrom 253 feet, engaged in conversation. As he concludes his conversation, and is passing out of the door onto the highway, the long whistle of an approaching locomotive engine up in the cut towards Milwaukee is heard by each one of plaintiff's witnesses who were in the village that morning, and by the person to whom Miller had just been talking. Just then, suddenly, and without any other apparent cause, he commenced running very fast down the middle of Rio street, towards his horses, hitched on the other side of the track. He continues down the street without diminishing his speed, crosses the side track, and is just in the act of stepping over the first rail of the main track, when he is struck by the pilot, and receives the injury from which he died. The whistle was sounded at the cut, also half way between the cut and Rio street, and was sounded for the brakes just at the moment the deceased was struck. The railroad track crosses Rio street at the business centre of said vil-

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lage, within a few feet of the front door of the post-office, and between the post-office and depot. From the place where Miller started to run, down to within eight feet of the side track, his view of the approaching train was more or less obstructed by buildings and lumber piled between Rio street and the railroad, in the direction from which the train was approaching; but after he got within about eight feet of the side track, his view up the track towards the approaching engine would be unobstructed for nearly half a mile. Miller's senses of sight and hearing were sound and unimpaired, and it does not appear that anything occurred while he was running to unexpectedly divert or attract his attention. His horses were standing where he tied them, and remained there after the train had passed.

The jury found, in answer to questions submitted, that Miller, after hearing the whistle of the approaching train, after hearing the noise of the approaching train, and after seeing the approaching train, attempted to cross the defendant's track in front of the locomotive; that had he stopped to look out in the direction this train was approaching, just before entering upon the defendant's right of way and track, he could have seen the train; and that he was not guilty of a want of ordinary care and prudence in not avoiding the accident, or in running upon the track in the manner he did, which contributed to produce the injury.

"We cannot but regard these findings as inconsistent with each other. There is nothing in the case tending to show any overruling necessity to the unfortunate man to incur the fearful and fatal risk; nothing to show why he did not and could not have stopped" before entering upon the track, "and awaited the passing of the train. The attempt to cross appears to have been a wanton exposure of life to instant and terrible danger. And surely" it would seem that "he could have avoided it by the easiest exercise of ordinary care, by simply obeying the most natural instinct of any intelligent

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creature in the circumstances, by merely stopping" before he reached the track, "until the train had passed."

Now it cannot with any propriety be said that the deceased was in the position of one who is paralyzed by some sudden danger, or confused by having to make an immediate choice between two perilous alternatives; for he ran directly into danger. Seeing the swiftly approaching train, he made no halt, but continued his course, and was in the act of stepping over the first rail of the main track, when he was struck and sustained the injuries from which he died. In view of the evidence, we think the findings of the jury are absolutely so inconsistent with each other as to warrant us in setting them aside.

The judgment of the circuit court must therefore be reversed, and a new trial ordered.

TAYLOR, J. This action is brought against the defendant company for negligently killing William Miller, of whose estate the plaintiff is administrator. The death of Miller occurred under the following circumstances: On the 12th of April, 1877, he came into the village of Rio, in Columbia county, with his team and wagon. He hitched his team at the side of the main street of the village, 225 feet west of the track of the defendant's railroad, at the point where it crosses said street, and then went up the street to a hotel 253 feet east of the railroad track, and transacted some business there; and, while conversing with a person at that place, he heard the whistle of an approaching train one-half a mile east of the place where the road crosses said street. Immediately upon hearing the whistle, he started upon a fast run along the street towards the place where his horses were hitched, and did not stop or lessen his speed until he stepped upon the main track of the railroad, when he was struck by the approaching engine and instantly killed. The evidence showed that his team of horses were young and spirited; that he was

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a young man about thirty years old, having a wife and children, ordinarily intelligent, and a careful and prudent man; that the train by which he was killed was coming from the east, and not a regular train, but one sent out with an officer of the road to attend to important business at Kilbourn, and was composed of only the engine, tender, and one car; that the people at Rio had no notice that such train was to pass over the road at that time; that it was running at the rate of at least forty miles per hour when it crossed the street and killed the deceased, and that no bell was rung within eighty rods of said crossing; that Rio was a station on the road at which passenger trains stopped, and that a freight train was due at that place within a few minutes after the accident happened; that the ordinary passenger trains ran at about the rate of twenty miles per hour, and freight trains at about twelve miles per hour; that the passenger depot was a few rods west of the street crossing where the accident happened; that in running down the street, from where the deceased started to within twenty-one feet of where the main track of the road crossed the street, his view of the approaching train was partially obstructed; and that the deceased lived within two miles of the village, and had a general knowledge of the time when trains passed through.

Upon this state of facts, the defendant insisted that the court ought to have directed a peremptory nonsuit. This was refused, and the case was submitted to the jury for a special verdict. The jury found that the company was guilty of negligence, and that the deceased was not guilty of any contributory negligence.

It is insisted upon this appeal, that the evidence shows a state of facts which requires the court to say, as a matter of law, that the deceased was guilty of contributory negligence, and that his administrator cannot recover in this action. The reason given by the learned circuit judge who presided at the trial of this case in the court below, for refusing to grant a

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new trial on the motion of the defendant, satisfies me that, upon all the facts of this case, the question of contributory negligence was a question of fact for the jury, and not of law for the court.

What amounts to the want of ordinary care on the part of an individual, when predicated upon any one of his acts, depends upon such a variety of circumstances in almost every case, that it is impossible to lay down any general rule which can govern. It is seldom that any two acts which result in an injury occur under the same or even like circumstances. What would be rashness in one man might be but an act of ordinary prudence in another. A strong, vigorous and agile young man might with safety, and without being chargeable with want of ordinary care, leap a ditch or chasm which would be little short of suicide if attempted by another who was enfeebled by age or sickness. It might be a rash act in a man whose strength had been wasted and his limbs stiffened by old age, to attempt to pass a railroad track in front of an approaching train, even though such train might be a hundred or even two hundred feet distant; but the young man full of youthful vigor, with strong limb and firm step, might cross the same under like circumstances without subjecting himself to the charge of want of ordinary care.

No general rule has been attempted to be laid down by any of the courts upon this subject, and none can be. Each case must depend upon its own circumstances. And unless, in a given case, the facts are conclusive, the question is for the jury and not the court. This is evident from an examination of a few of the cases decided in this court. In the case of *Urbanek v. Railway Co.*, ante, p. 59, this court held that it could not say, as a matter of law, that the plaintiff was guilty of contributory negligence, although the evidence showed that he permitted his team to run against a passing train, and he was thereby injured. The evidence showed that he was driving his team before a loaded wagon; that

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in approaching the railroad crossing he had to approach through a deep cut, so that he could not see the train until it passed in front of him; and, the evidence tending to show that he could not stop his team, on account of the descent in the road, after the train came in sight, the question of contributory negligence was submitted to the jury, and a verdict in favor of the plaintiff was affirmed. In the case of *Ditberner v. Railway Co.*, ante, p. 138, we held that an employee whose business was to repair the track in the station yard, was not, as a matter of law, guilty of contributory negligence, although he stood on the track with his back to the train, and the train approaching slowly struck him in the back and injured him. In this case, the circumstance that the person injured was the employee of the company, and engaged at his ordinary work, was controlling in his favor. Had he been a stranger to the company, this court would probably, as it did in the case of *Delaney v. Railway Co.*, 33 Wis., 67, have held that he could not recover, because he was careless in standing on the railroad track.

In the case at bar, it is quite clear that if the train which did the injury had been either an ordinary passenger or freight train, the deceased would not have been injured; that he would, in the case of an ordinary passenger train, have passed the track a quarter of a mile in advance of it; and had it been an ordinary freight train, he would have passed it still further in advance. The evidence shows, and I think most satisfactorily, that the train came at the rate of forty miles per hour, and yet the deceased reached the track at the same time it reached the crossing. It had run a half mile from the time the deceased started until he reached the track; had it run half as fast as it did, or twenty miles per hour, it would have been just one-quarter of a mile from the crossing when the deceased reached it. I cannot say, upon this state of the case, that the deceased was guilty of any negligence, when he heard the whistle of the approaching train, in start-

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ing for the purpose of crossing the track and securing his team while the train passed; and I think it is a fair inference from all the circumstances of the case, that such was his object. He had no reason to suppose, when he started, that there was a train approaching at the speed of forty miles per hour; the whole history of the management of the road negatived any such presumption; and it was not careless in this unfortunate man that, relying upon the custom of the road, he concluded he could pass it with safety before the train reached the crossing, and that he started down the street for that purpose. But it is said that, admitting that he was not guilty of any carelessness or rashness in first setting out to cross the road, he should have watched the approaching train, and, when he came near the track, have discovered the dangerous speed at which it was approaching, and have then stopped. If he saw the train when he got within twenty feet of the track, it must have been then more than two hundred feet from the crossing, because the evidence shows that it ran at the rate of ten feet to the deceased's one; and if it had been running at the speed the deceased had a right to suppose it would be running, he could have safely crossed even then.

I do not think we are called upon as a matter of law to say that the deceased was guilty of culpable negligence because, when he got near the track and saw the train nearer than he had reason to expect it would be, he did not instantly discover that it was approaching at a very unusual speed and instantly stop. Up to the instant he came within twenty feet of the track, he had every reason to believe the train was not within one-fourth of a mile of him. That it was, in fact, much nearer was the culpable fault of the defendant in approaching the crossing at such an unusual and dangerous rate of speed, and without warning. The confusion created in the mind of the deceased (if we are permitted to suppose that there was any such confusion) was caused by the wrongful acts of the defendant, and it does not lie with them to say that the deceased

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should have acted more coolly. We must presume that this strong young man, in the very prime and vigor of his life, did not purposely throw himself in the track of this death-dealing engine, nor throw himself on the track without the firm belief that it was safe to do so. The result shows that he made a fearful mistake, and the mistake cost him his life; but if the acts of the defendant caused the mistake, or led him into it, he is without fault. And when his representatives prosecute the guilty company for a slight compensation for the death caused by this mistake, which the deceased was led into by its gross wrong, it is most unjust to charge upon him that he culpably threw away his life.

In Shearman and Redfield's work on Negligence, § 30, it is said: "So, too, allowance is made for circumstances, and if, by the defendant's fault, the plaintiff is suddenly put in danger, the plaintiff is excused for omitting some precautions, under the disturbing influence of fear, which, if his mind had been clear, he ought to have taken." This rule is well sustained by the decisions of this court, as well as by those of other states, and is in itself a most reasonable one. Applying the rule to this case, we find the deceased approaching the track at a rapid rate, in the full assurance that he had ample time to cross the track in front of the approaching train; and when he arrives within a few feet of the track, he is suddenly, and by the clear misconduct of the defendant, put in a position of great peril if he proceeds. But even then the extent of his peril was not clearly and instantly apparent. He made a mistake, and went forward; and it is now urged that he was killed by his own fault. I cannot say that, from the facts proved, it is so as a matter of law. As was said by the late learned Chief Justice Dixon, in the case of *Barstow v. The City of Berlin*, 34 Wis., 357, 363: "Negligence, like fraud, is not to be presumed, but must be proved; or at least there must be some facts upon which to base the inference. I agree that the inference might have been upheld upon the facts of the case; but

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it seems to me it was an inference of fact and not of law, and so one to have been drawn by the jury and not by the court. Like some other cases, very peculiar in their circumstances, which have arisen, it was at best but a leap in the dark, and I think it was for the jury to take that leap. It was for the jury to guess; and as they guessed, so the decision must have been. I think the court was wrong in attempting to cut the knot instead of handing it to the jury to cut." Similar language was used by Justice COLE in *Ewen v. Railway Company*, 38 Wis., 613-631: "It appears to us it would be incorrect to say, as a proposition of law, that if the child was capable of exercising the same degree of care with respect to crossing the track as would reasonably be expected from an adult, then he was guilty of such negligence as prevented a recovery. *This is to strike out of view all the circumstances attending the transaction which might possibly prevent an adult, in the exercise of ordinary prudence*, from avoiding the injury. The general rule as to the duty of a person crossing a railroad track to look about him, and not rush blindly into danger, was stated by the court. But certainly, in determining the question of contributory negligence, it would be proper for the jury to consider the situation of the different tracks at the crossing. The fact that cars were standing on the track of the iron company, which to some extent cut off the view of the approaching engine and tender on the defendant's track; *the fact that the engine was backing down the track at an unlawful speed, which might well deceive one calculating the chances of a safe crossing*; and the further fact that a train was coming in the opposite direction on the St. Paul road, which might divert the attention — these facts should all enter into the consideration of the question whether a person would be excusable in not seeing the approaching engine; and therefore a want of due care could not necessarily be predicated upon the mere circumstance that the boy did not see the engine, if such was really the case." In the case of *Newson v. Railroad Company*, 29 N. Y., 383,

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389, Justice JOHNSON, who delivered the opinion of the court, very justly and forcibly says: "It would be going too far in favor of these corporations, using these weighty forces, so irresistible and so dangerous to those happening to come in their way, to hold as a matter of law that a person receiving an injury had been negligent, and so remediless, *unless he acted upon the assumption that they would in any case act in total disregard of his rights, and their own plain duty towards him and others.*"

In the case of *D. & M. Railroad Company v. Steinburg*, 17 Mich., 99, the question when contributory negligence was a question of fact for the jury, and when of law for the court, was discussed at great length both by counsel and the court; and Chief Justice COOLEY, who delivered the opinion, comes to the conclusion that as a general rule the question of such negligence is a question of fact for the jury, and to warrant the court in any case in taking that fact from the jury, and instructing them as a matter of law that the plaintiff was guilty of such negligence, the case must be so clear against him as to warrant no other inference. And I do not understand that this court, in any adjudicated case, has laid down or intended to lay down a different rule. In discussing the question as to the propriety of the court passing upon the question as one of law, where the misconduct of the defendant increases the danger in which the plaintiff is placed at the time, the learned chief justice says: "Negligence, as I understand it, consists in a want of that reasonable care which would be exercised by a person of ordinary prudence, under all the existing circumstances, in view of the probable danger of injury. The inquiry is, therefore, one which must take into consideration all the circumstances, and it must measure the prudence of the party's conduct by a standard of behavior likely to have been adopted by other persons of common prudence. Moreover, if the danger depends at all upon the action of any other person, under a given set of circumstances, *the prudence of the party injured*

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must be estimated in view of what he had a right to expect from such other person, and he is not to be considered blamable if the injury has resulted from the action of another which he could not reasonably have anticipated. Thus the problem is complicated by the necessity of taking into account the two sets of circumstances affecting the conduct of different persons, and is only to be satisfactorily solved by the jury placing themselves in the position of the injured person, and examining those circumstances as they then presented themselves to him, and from that standpoint judging whether he was guilty of negligence or not. It is evident that such a problem cannot usually be one upon which the law can pronounce a definite sentence, and that it must be left to the sifting and determination of a jury."

Cases might be cited by the hundred to show that, in order to take the question of contributory negligence from the jury, all the facts and circumstances must be so plain and clear that a person of ordinary intelligence must be satisfied that the act was not an act which a person of ordinary prudence would have done under those circumstances. If the circumstances leave a fair doubt in the mind that the act would have been done by a man of ordinary prudence, under like circumstances, then it is a question for the jury and not for the court. Precedents are of little aid in determining a question of this kind. Every case is surrounded by its own circumstances, and no two cases in a thousand will be likely to be attended by exactly the like state of facts. Courts of last resort have enough to do without dealing with questions of pure fact. In the case of *Smith v. Railway Co.*, L. R., 5 Com. Pleas, 102, which was a question of negligence, Justice BRETT says: "I am of the opinion that there was no evidence to go to the jury, of negligence on the part of the defendant;" and then remarks: "I cannot help feeling that great difficulty is thrown upon the judges who are called upon to determine questions of this sort, which makes them too much judges of

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facts." He then goes on to hold that in his opinion there was no evidence of negligence to go to the jury; yet in the same case his associates, Chief Justice BOVILL and Justice KEATING, who concur in feeling the difficulty in which they are placed by having to deal with these questions of fact, come to a different conclusion, and hold that in their opinions there was evidence to go to the jury upon this question of negligence. In the case of *Butler v. Railway Co.*, 28 Wis., 487, the late Chief Justice DIXON quotes the remark of Justice BERRY above given, and says: "The present case is well adapted to illustrate its truth, especially so far as the latter question, or that of contributory negligence, is concerned;" and, after struggling with the case through a long and able argument, he comes to the conclusion that the question of contributory negligence was properly submitted to the jury, and that the refusal of the court, under all circumstances of that case, to charge the jury that "if he (the deceased) saw the cars approaching, or might have seen them by looking, he was guilty of negligence," was not error.

I do not think that as a matter of law we can say that the answers of the jury to questions 25, 26, 27, 28 and 29, when viewed in the light of the evidence given on the trial, are necessarily inconsistent with each other, and therefore require the reversal of the judgment for the plaintiff rendered thereon. To the 25th question the jury say, the deceased did not know that the train was about to strike him, long enough to have stopped and avoided contact with it before he was struck. To the 26th they say that, after hearing the whistle and the noise of the approaching train, and after seeing it, he attempted to cross the track in front of the locomotive. To the 27th they say, he did not know that the train was near enough to the place where he attempted to cross, to run on him while crossing, before he started to cross the track. To the 28th they say, if he had stopped to look out in the direction that the train was coming, just before entering upon the defendant's right of way

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and track, he could have seen the train. To the 29th and 30th they say that he did not, through want of ordinary care, prudence and diligence, contribute to the injury, and that he was not in fault in not avoiding the accident, or in running upon the track in the manner he did, under all the evidence.

Now there can be no inconsistency in these answers unless we can say as a matter of law, upon the evidence, that it was under all the circumstances the duty of the deceased, in the exercise of ordinary prudence, to have stopped before crossing the track, or that under the evidence he ought to have known it was hazardous and rash to attempt to cross in front of the approaching train. As I have said above, upon the evidence, I am very clear that these questions were questions of fact for the jury. I do not think that the evidence shows that the deceased thought there was any danger in attempting to cross. The evidence, in my estimation, clearly shows that when he heard the whistle of the approaching train, and started to cross the track, he was guilty of no rashness or negligence. He had the right to suppose there could be no doubt as to his ability to run 260 feet while the train was running 2,640 feet, at any rate of speed he was called upon to believe the train would run; and the proof shows that if the train had run at the speed he had the right to believe it would run, and at which under the circumstances it ought to have run, he would have passed the point of danger one-quarter of a mile ahead of the train; and having every reason for believing he would cross the track far ahead of the train, he was not, perhaps, called upon to exercise any extraordinary care in approaching the track, and was not called upon to stop and make further investigation as to the whereabouts of the engine before attempting to cross. The answer of the jury that he saw the train and heard its noise before attempting to cross in front thereof, does not show, as a matter of law, that he was culpable in making the attempt.

When he came within twenty feet of the track, there was

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nothing to obstruct his view of the train; he probably saw it then and heard its noise. The jury supposed he did, though there is no evidence of the fact except the strong probabilities of the case; but the evidence also shows that there was no hesitation on the part of the deceased. If he saw the approaching train, as he probably did, when within twenty feet of the crossing, he saw it at a distance of over two hundred feet from him; and, seeing it at that distance, and supposing it was running at the speed it ought to have been running, I cannot say, as a matter of law, that it was a want of ordinary care in him that he did not stop. It is urged that when he saw the train so much nearer than he had expected it would be, he ought to have instantly come to the conclusion that it was running much faster than he had anticipated, and therefore should have stopped. I suppose it would be difficult to tell how fast a train was approaching by a momentary glance at it, as it was approaching the observer. The deceased might have thought that, although it had approached much faster than he anticipated, yet it would slow as it approached the station, and therefore it was safe to pass. Unless we are prepared to say, as a matter of law, that it is a want of ordinary care for a young and active man to attempt to cross a railroad track, starting rapidly from a point not more than twenty feet distant from the same, when an approaching train is at least two hundred feet from the point of crossing, the train going not more than twenty miles per hour, then we cannot say, under all the evidence in the case, that, as a matter of law, the deceased was guilty of contributory negligence. That the train in this case was going at more than twice that speed, in fact, was not the fault of the deceased, nor does the evidence show that he knew the fact; and that circumstance should not, therefore, be considered in determining the question of his negligence, as a matter of law, although it might be considered in determining it as a question of fact.

In my opinion the special verdict is not inconsistent with

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itself, and the judgment of the circuit court should be affirmed.

By the Court.—The judgment is reversed, and a new trial ordered.

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DEED: MORTGAGE. *Certain papers and transactions held not to convert a deed absolute on its face into a mortgage.*

1. Defendants being in possession of real estate under an unexpired lease from plaintiff, the following instruments were exchanged and took effect on the same day in 1859: 1. A warranty deed from plaintiff, for the consideration of \$1,200 therein named, conveying the property absolutely, in fee, to the defendant C. 2. An agreement of C. to reconvey the property to plaintiff (with covenants against his own acts), if the latter should pay C. \$1,200 on the 4th of August, 1861; with covenant that time should be of the essence of the contract, and with a further agreement that C. should have possession and enjoyment of the property until said sum was paid. 3. A quit-claim deed from plaintiff to C.; and 4. An agreement that said quit-claim deed should be placed in the hands of one X., to be held by him until said August 4, 1861, to be delivered by him to plaintiff in case of payment of the \$1,200 by plaintiff to C. on that day, and otherwise to be delivered to C. This agreement contained a recital of the essential terms of the instrument secondly above described, and constituted X. plaintiff's attorney to hold and deliver the quit-claim deed as above stated. 5. A lease of the same property from plaintiff to defendants for a term of years commencing September 10, 1861; to take effect only in case defendants gave plaintiff written notice, at least three days before said last named date, that they elected to take under the lease. On the day of the delivery of these papers, defendants' prior lease was surrendered by them to plaintiff. None of the papers contained any agreement by plaintiff to pay \$1,200 at any time. *Held*, that, upon their face, said papers (with the surrender of the prior lease) do not show the relation of debtor and creditor to have existed between plaintiff and C.; and the transaction was an absolute conveyance and a conditional agreement to reconvey, and was *not* a mortgage.
2. In this action to redeem from the lien of an alleged mortgage, etc., this court regards the *parol* evidence as not sufficient to justify it in holding, contrary to the finding and judgment of the court below, that the real transaction was a loan of money by C. to plaintiff, secured by the instruments above described; and it therefore affirms a judgment for defendants.

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APPEAL from the Circuit Court for *Dane County*.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought by *Ann M. C. Smith*, with *A. Hyatt Smith*, her husband, and *Charles D. Mead*, the trustee of her separate estate, for the purpose of redeeming certain real estate from the lien of what is claimed to be a mortgage thereon, given by *Ann M. C. Smith* to the defendant *J. B. Crosby*, to secure the payment of a loan of \$1,200, and for an accounting by the defendants for the rents and profits of the mortgaged premises from the time it was alleged said mortgage became due.

"The transaction which was alleged to be the mortgage, took place about the 4th of August, 1859.

"The evidence shows that at the time of the giving of the alleged mortgage by said plaintiff, and for a year or more previous thereto, the defendant *J. B. Crosby*, as executor of the estate of Nathaniel Crosby, and two other persons, Horatio N. Busk and Adam Andre, had been in possession of the property claimed to be mortgaged, under a lease from the plaintiff, which was still in force and unexpired. The written evidence introduced on the part of the plaintiff to establish the fact that the property had been mortgaged by her to said *Crosby* to secure a loan of \$1,200, was as follows:

"1. A deed of warranty, with full covenants, bearing date the 3d day of August, 1859, by which *Ann M. C. Smith* and her husband, for the consideration of \$1,200 mentioned in said deed, conveyed the property in question to the defendant *Crosby* in fee, absolutely, without any conditions whatever.

"2. An article of agreement bearing date the 4th day of August, 1859, by which said *Crosby* agreed to convey the same property described in the deed, to the said *Ann M. C. Smith*, on condition that the latter should pay to *Crosby* \$1,200 in two years from the date of the contract; and it was covenanted that time should be of the essence and a material part of the contract, and that, in case the said *Smith* failed to pay the said

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\$1,200 on the 4th day of August, 1861, the contract should be null and void. It contained a further understanding that *Crosby* was to have the possession and enjoyment of the property agreed to be sold, until the \$1,200 was paid; and, if the said sum was paid according to the terms of the contract, he agreed to convey the property to the said *Smith* by a good and sufficient deed, containing covenants against his own acts.

"3. A quit-claim deed, made by *Ann M. C. Smith* and her husband to said *Crosby*, bearing date the 4th day of August, 1859, purporting to convey the same premises to the said *Crosby* in fee.

"4. A written agreement, by which it was agreed that said quit-claim deed should be placed in the hands of I. C. Sloan, to be held by him until the 4th day of August, 1861, and on condition that if *Ann M. C. Smith* should pay on that day to *Crosby* the sum of \$1,200, then the deed was to be delivered to her; but in case she failed to pay said sum on the day mentioned, then the same was to be delivered to *Crosby*; and the contract further constituted said Sloan the attorney of *Ann M. C. Smith* and her husband for the purposes of holding and delivering said deed according to the terms of said agreement. This contract begins with the following recital: 'Whereas, an agreement in writing, bearing date this 4th day of August, A. D. 1859, between *James B. Crosby* of the first part and *Ann M. C. Smith* of the second part, has been duly executed by the said parties thereto, in and by which said agreement the said *James B. Crosby* agrees to sell and convey unto the said *Ann M. C. Smith* the right and privilege of drawing and using a certain amount of water from the water power in the city of Janesville, commonly called the Monterey Water Power, which said right and privilege is more fully described in the said agreement, to which reference is hereby made, on condition that said *Ann M. C. Smith* shall punctually pay unto said *James B. Crosby* the just and full sum of \$1,200 on the 4th day of August, 1861, the time of payment being

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considered and made material and of the essence of said agreement.'

"5. A lease of the same real estate, executed by *Ann M. C. Smith* and her husband to *Busk, Andre and Crosby*, executor, etc., bearing date on the 2d day of August, 1859, by which the parties of the first part leased unto the parties of the second part the same water rights contained in the other contracts and deeds, for a term of years therein mentioned, the term to commence on the 10th day of September, 1861. This lease was made to take effect only upon the conditions that the lease and the conditions contained therein should not be operative or binding upon the parties of the second part unless they gave the parties of the first part notice in writing, at least three days before the said 10th day of September, 1861, that they elected to use said water under this lease; and in case said notice were given, then the lease to be operative and binding.

"This lease was signed by *Ann M. C. Smith* and her husband, and by *H. N. Busk, Adam Andre and James B. Crosby*, executor of the estate of *Nathaniel Crosby*, deceased.

"6. The lease of the same property, theretofore held by the same parties as lessees of *Ann M. C. Smith* and her husband, was, on the day of delivery of all the other papers above referred to, surrendered by the said lessees, and the surrender accepted by the lessors.

"The evidence further shows, and is undisputed, that though some of the papers above referred to bear date on different days, they were in fact all delivered so as to take effect on the same day."

Upon the facts found, the circuit court held that there was no loan from *J. B. Crosby* to *Mrs. Smith*, and no mortgage from the latter to *Crosby*; that there was an absolute sale and conveyance of the property described in the warranty deed of August 4, 1859, with the privilege on the part of *Mrs. Smith* to repurchase the property on specified conditions, none of which had ever been performed by her; that the conditional agree-

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ment to reconvey had been fully cancelled by the quit-claim deed above mentioned; and that plaintiffs were not entitled to any part of the relief demanded.

From a judgment in accordance with these findings, the plaintiff appealed.

A. Hyatt Smith, for the appellant.

For the respondent, there was a brief by *Cassoday & Carpenter*, and oral argument by *Mr. Cassoday*.

TAYLOR, J. It is insisted by the learned counsel for the appellant, that the conveyances and contracts above described, unexplained by any parol evidence, show that the transaction was a loan of the sum of \$1,200 by the said *Crosby* to the said *Ann M. C. Smith*, to be paid in two years from the date of such loan; and that, instead of receiving interest on the money loaned, he was to have the use of the property, discharged of the rent secured to her by the lease, the surrender of which was accepted by her at the time of making the loan. On the other hand, the learned counsel for the respondents insists that the writings show an absolute sale of the property — which was a right to the use of certain water taken from the Monterey dam in the city of Janesville — by the plaintiff to *Crosby*, accompanied by an agreement on his part that, in case the appellant would pay him the sum of the purchase money punctually in two years from the sale thereof, he would reconvey the same property to her; he, in the meantime, to have the possession and use of the property purchased by him. Independent of any evidence explanatory of the transaction, and relying only upon the legal effect of the written instruments offered in evidence, we are compelled to concur in the view of the case taken by the counsel for the respondents. The deed and contract, which are the material papers in the case, do not show the transaction to be a mortgage. The deed is absolute on its face, and does not indicate anything but a sale on the part of the appellant, and a purchase on the part of

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Crosby. It certainly does not tend to show that there was the relation of debtor and creditor existing between the appellant and *Crosby*. If it raises a presumption of indebtedness at all, it is the presumption that *Crosby* might be indebted to the appellant for the purchase money; certainly not that she was indebted to him. The contract made at the same time for the conditional reconveyance of the property to the appellant does not contain any covenant or agreement on the part of the appellant to pay the sum of \$1,200, or any part of it. It is simply an agreement to convey, on condition of the payment of a fixed sum at a specified date, and does not create the relation of debtor and creditor between the parties. The surrender of the lease under which the property was formerly held by the grantee with others, is entirely consistent with the theory that he was a purchaser of the property absolutely in fee; and such surrender would be inconsistent with the theory that the deed was given as security for a loan. The possession by the grantee in the deed under it is consistent with the theory of a purchase, and inconsistent with the theory of a mortgage. The making of the quit-claim deed was a proper precaution to cut off any possible right which the vendee in the contract might claim in equity, to have the contract enforced in her favor, notwithstanding she might not pay the purchase price in accordance with the terms of the contract. The giving of the conditional lease, and the acceptance of the same by the same parties who held the lease at the time of the purchase, was a proper precaution in case the appellant repurchased the property under her contract with *Crosby*. None of the written evidence is inconsistent with the legal effect of the warranty deed from the appellant and her husband to *Crosby*. Standing alone, they show an absolute conveyance from the appellant to the defendant *Crosby*, and not a conveyance by way of mortgage as a security for money loaned. It is said that the intention of the parties is the real criterion by which courts must be guided in determining whether in a

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given case the transaction is a sale or a mortgage. Jones on Mortgages, § 258. In this case, so far as the intention of the parties can be ascertained from the written contracts between them, there is nothing to show anything in the character of a mortgage. They do not evidence a loan, or in any way show a liability on the part of the appellant to repay the \$1,200 which was the consideration for the deed.

This case, upon the papers alone, is a much stronger case than that of *Conway's Ex'rs v. Alexander*, 7 Cranch, 218. In that case the supreme court of the United States held, that when land had been conveyed to a third person in trust to reconvey to the grantor if he should repay the purchase money before a day named, and if not, then to convey to the purchaser, in the absence of a bond, or note, or other evidence of indebtedness, the transaction must be regarded as a conditional sale. Chief Justice MARSHALL, who delivered the opinion of the court, said: "To deny the power of two individuals, capable of acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the courts of chancery, in a considerable degree, the guardianship of adults as well as infants. Such contracts are not prohibited either by the letter or the policy of the law. . . . In this case the form of the deed is not in itself conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is therefore a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to

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justify a construction which overrules the express words of the instrument. Its existence in this case is certainly not to be collected from the deed. There is no acknowledgment of a preëxisting debt, nor any covenant for repayment." The foregoing remarks of the late learned chief justice of the supreme court of the United States will apply with much greater force to the case made upon the face of the written evidence in the case at bar, than they did to the case then under consideration. For a further illustration of the difference between a mortgage and a sale with a condition or agreement that the grantor may repurchase the property at a future time for a specified sum, see Jones on Mortgages, §§ 257-261, and cases cited in his notes; *Wilcox v. Bates*, 26 Wis., 465; *Glendenning v. Johnston*, 33 Wis., 347.

It being clear that upon the written evidence the appellant failed to make out any right to redeem the premises upon the ground that the defendants held the possession of them by virtue of a mortgage and not by virtue of a deed, the only remaining question is, whether the parol evidence introduced by the respective parties changed the rights of the parties as they appeared from the writings introduced, and satisfactorily showed that, notwithstanding the absolute nature of the conveyance made, the transaction was in fact a loan of money by the defendant *Crosby* to the appellant, and these writings were given to secure such loan, and not with the intention of passing the absolute title to the said defendant.

Upon this point, after a full hearing of the case by the learned circuit judge, he has found against the appellant. After a careful examination of the whole evidence, we are satisfied that this finding is sustained by the evidence, and that there certainly is not any such preponderance of the evidence against such finding as would justify this court in reversing the judgment on the ground that such finding is clearly against the weight of evidence. On the contrary, looking simply at the evidence as it appears in the record, without

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the advantage of seeing the witnesses in court, and witnessing their appearance and the manner of giving their testimony, we think the clear preponderance of the evidence is in favor of the finding of the learned circuit judge. Upon the whole record, we are satisfied that the judgment of the court below is fully sustained by the evidence, and that no errors have intervened which entitle the appellant to a reversal of the same.

By the Court.—The judgment of the circuit court is affirmed.

NIEUWANKAMP and another vs. ULLMAN.

COURT COMMISSIONER: CONTEMPT: SUPPLEMENTARY PROCEEDINGS.

(1) *How disobedience of court commissioner punished.* (2) *His jurisdiction in supplementary proceedings.* (3) *What constitutes a contempt.*

1. The circuit court has jurisdiction to punish as for contempt disobedience of a lawful order of a court commissioner, even if the commissioner himself had power to punish such contempt. R. S., sec. 3477.
2. In a proceeding supplementary to execution, a court commissioner has no authority, in any state of the case, to order a delivery of the debtor's property to the judgment creditor or his attorney, and such an order is absolutely void.
3. A delivery of the property in obedience to such void order, and in violation of a valid order of another court commissioner, in another proceeding, forbidding the debtor to transfer or dispose of his property until further order therein, is a *voluntary* delivery, and, though *honestly* made, is a *contempt*. But in such a case, where no damage has accrued to the creditor, the punishment should be made nominal.

APPEAL from the Circuit Court for *Outagamie* County.

This appeal was taken by the plaintiffs from an order denying their motion for an attachment against defendant for a contempt. The grounds of the motion will appear from the opinion.

George W. Todd, for appellants.

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For the respondent, there was a brief by *Collins & Pierce*, and oral argument by *Mr. Pierce*.

OEROX, J. It appears that the appellants, as judgment creditors of the respondent, obtained an order from the Hon. Samuel Baird, a court commissioner, on the 30th day of January, 1879, for his examination supplementary to an execution on the 6th day of February, and in said order an injunction forbidding the respondent from transferring or otherwise disposing of his property, not by law exempt from execution, until further order in the premises; that on the 31st day of January one F. Strauss, another judgment creditor of the respondent, obtained a similar order from the Hon. Samuel Boyd, a court commissioner of the same county, for the examination of the respondent in proceedings supplementary to an execution returned in part unsatisfied, on the 5th day of February; and that the orders in both cases were served upon the 31st day of January, but that the orders in the first mentioned case were served first in the order of time. It further appears that on his examination before Commissioner Boyd, on the 5th day of February, the respondent disclosed, as his property liable to execution, 104 shares of stock of \$25 each in the Appleton Furnace Company, one gold watch and chain, one-half interest in one lumber wagon, promissory notes against divers persons of the value of \$250, and book accounts against sundry persons of the value of \$1,200; that thereupon said court commissioner ordered and directed that said property be applied to the satisfaction of said judgment, and that the respondent deliver the same to one Henry D. Ryan, the attorney of the said judgment creditor Strauss; and that the respondent at once obeyed and complied with said order by the delivery of said property to the said Ryan without objection.

The order first obtained and served, and returnable on the 6th day of February, was adjourned until the 13th day of the same month; at which time, the above facts appearing, and it

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appearing also that the respondent had no other property than that so transferred to Ryan, the attorney of Strauss, by the direction of said order, subsequent proceedings were suspended before Commissioner Baird, and the papers filed in the circuit court.

These facts subsequently appearing to the circuit court, an order was made and served that the respondent show cause why he should not be punished for his alleged misconduct in disobeying the said order of Commissioner Baird, by disposing of and transferring said property as aforesaid, by which the rights and remedies of the appellants were defeated and impeded; and upon the hearing thereof the circuit court adjudged the respondent not guilty of contempt therein, and said order was denied and discharged.

Upon these facts it is very clear that the respondent should have been adjudged in contempt for disobedience of the injunctive order of Commissioner Baird, and that he did not show sufficient cause why he should not be punished therefor.

1. Notwithstanding that Commissioner Baird might have had jurisdiction to punish the respondent as for contempt, for disobedience of his order of injunction, yet such jurisdiction was not exclusive of the circuit court in such a case. Sec. 3477, R. S. 1878.

2. The order of Commissioner Boyd for the delivery of the property to Ryan, the attorney of the judgment plaintiff Strauss, was *absolutely void*, and afforded no protection or excuse for the disobedience of the order of injunction of Commissioner Baird. The proceeding before Commissioner Boyd being supplementary to an execution returned in part unsatisfied, it was the duty of the commissioner to have appointed a receiver of the property, and ordered its delivery to him. Subd. 3, sec. 2797, R. S. 1878. If this had been done, the rights of the appellants would not have been defeated or jeopardized. There is no case or possible circumstances in which a court commissioner, in supplementary proceedings, is author-

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ized by law to order the delivery of such property to the plaintiff in the execution or to his attorney, and there is no provision whatever for the sale or disposition of such property, or its application in satisfaction of the judgment, or what is to be done with the property, or how its application is to be made by the plaintiff or his attorney. This order is not only without authority, but in direct violation of law, and such an one as the court commissioner had no jurisdiction to make. It is not merely *irregular*, but a *nullity*, according to the test recognized in *Salter v. Hilgen and another*, 40 Wis., 863. It is an order which the commissioner under no circumstances had authority to make. *Petition of Crandall for a Habeas Corpus*, 34 Wis., 177; *Petition of Semler*, 41 Wis., 518.

3. The delivery of the property to the attorney of the plaintiff Strauss by the respondent, in obedience to such a void order, must be held to have been voluntary, and it was no excuse that such delivery was made *honestly*, if made *unlawfully*. *Johann v. Rufener, Garnishee*, 32 Wis., 195.

It does not appear that the appellants have lost all remedy against the property and the party to whom it was so unlawfully delivered by the respondent in violation of the injunction; and we therefore think that the respondent should have been adjudged in contempt, and his punishment made nominal, leaving the appellants to such remedy as they may be advised.

By the Court.—The order of the circuit court is reversed, with costs, and the cause remanded for further proceedings according to this opinion.

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DIMOND VS. HENDERSON, imp.

EQUITY: PARTNERSHIP: EVIDENCE: INTEREST. (1) *What rights of partners to be determined on dissolution.* (2) *Burden of proof as between partners.* (3) *Evidence as to partnership accounts.* (4) *When partner chargeable with interest.*

1. In an action for dissolution of a firm consisting of four members, it was error to determine the rights and liabilities, as between themselves, of two members of the firm, growing out of their relations *as partners in another firm*, consisting of those two only.
2. The maxim, *Omnia præsumuntur contra spoliatores*, applied to a defendant who, being employed upon a salary to keep the books of the firm of which he was a member, kept them in such a manner as to render it impossible to determine correctly the state of the accounts between the partners.
3. It appearing, in such a case, that goods sold by weight or measure were taken from the store to be used in said defendant's family, without having been weighed or measured, and that the accounts as shown by the books could therefore not be relied upon as accurate in that respect, the referee for trial did not err in resorting to other sources of information in order to get at the real amount and value of goods so used.
4. While it is the general rule that one partner is not chargeable with interest on moneys of the firm in his hands, until a balance has been struck or an accounting had (*Marsh v. Fraser*, 37 Wis., 149; *Yates v. Shepardson*, 39 id., 173), yet, where one partner kept the account books, and knew, or ought to have known, the precise amount in his hands belonging to the firm, and made at one time what purported to be a full statement of the business, which was incorrect: *Held*, that there was no error in charging him with interest.

APPEAL from the Circuit Court for Door County.

Action for an accounting between partners and a dissolution of the partnership. The case is stated in the opinion. The defendant *Henderson* appealed from the judgment.

Brief for the appellant by *Hudd & Wigman*, and oral argument by *Mr. Hudd* and *O. F. Weed*.

Briefs for the respondent by *Ludwig & Somers*, and oral argument by *Mr. Somers*.

COLE, J. This action was brought for the dissolution of the copartnership of *Henderson, Coon & Co.*, a firm doing busi-

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ness at Sister Bay, Door county, and for winding up and settling the affairs of that partnership. The firm was composed of *Dimond*, the plaintiff, H. E. Coon, deceased (who is represented by his administrator, M. W. Coon), and the defendants *Henderson* and *Wilson*. The two former members of the firm were each entitled to one-third interest in the concern; *Henderson* and *Wilson* owned the other third. At the same time *Henderson* and *Wilson* were doing business at Palmyra, under the firm name of *Henderson & Wilson*. On the trial of this cause the business transactions of the latter firm seem to have been largely inquired into, and an unfortunate attempt was made, as we regard it, to adjust the affairs of that firm by the judgment rendered in this action. Of course it was competent for the court in this suit, on the dissolution of the partnership of *Henderson, Coon & Co.*, to determine the rights and liabilities of the members of that firm as between themselves, and to distribute the partnership property to those who were entitled thereto, according to their respective shares. But it could only lead to confusion to attempt at the same time to settle the affairs of *Henderson & Wilson*, and to adjust the rights of the partners of that firm in its property. Consequently, so much of the judgment of the circuit court as adjudges that the defendant *Z. Wilson* have and recover of the defendant *A. Henderson* the sum of \$2,377.97, as his share of the copartnership funds now in said *Henderson's* hands, we deem erroneous. This may possibly be the true amount which would be found due *Wilson* from *Henderson*, growing out of their private dealings or the business transactions of the Palmyra firm, but it has no connection with this suit and should not enter into the accounting here made. It will be seen that by the articles of copartnership of *Henderson, Coon & Co.*, *Henderson* and *Wilson* were entitled to a one-third interest in the property real and personal of that concern, and to a like share of the profits of the business. The plaintiff and the estate of H. E. Coon were each entitled also to a third of the

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same. There would seem to be no difficulty in distributing the effects and property of that firm upon that basis, leaving the affairs of the partnership of Henderson & Wilson to be adjusted in a distinct suit, should this become necessary. In stating the account of the partners as between themselves, it would obviously be correct that each should be charged with all the debts and moneys which he owes, or is accountable for, to the partnership of Henderson, Coon & Co.

The referee found from the evidence produced before him, that there was in *Henderson's* hands, belonging to the firm of Henderson, Coon & Co., the sum of \$2,268.37. With the exception of one item, which we think should be credited to *Henderson*, we are not prepared to disturb this statement. There is an item of \$314.50 on page 151 of the ledger, according to exhibit 11, which is made up of charges against *Henderson*, and which, the referee says, does not appear from the books ever to have been deducted from his credits. But this is a mistake, as was clearly pointed out by the learned counsel for *Henderson* on the argument; for on the same page of the ledger it plainly appears that this sum of \$314.50 was deducted from the aggregate credit of *Henderson* amounting to \$2,047.74, leaving the "balance due," as there stated, of \$1,733.74. This sum of \$314.50, therefore, should be deducted from the amount found by the referee to be in *Henderson's* hands belonging to the firm.

It is barely possible that there is error in some of the other findings of the referee, which does injustice to *Henderson*; but we are unable to tell wherein it consists, if such there be. And this arises from the fact that the books of the firm, which were introduced on the trial, were kept in such a confused and unintelligible manner that it is impossible to get at the real state of the accounts. The business of the copartnership was entrusted entirely to the management and control of *Henderson*. He was paid a salary for keeping the books and transacting the business in a proper manner, and if he kept the books

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so imperfectly and badly that the true state of the accounts and the transactions of the firm cannot be ascertained from them, it is but fair that every presumption to his disadvantage should be adopted. It is a case where the maxim, *Omnia præsumenter contra spoliatorem*, should be applied, for it is wholly his fault that the means of ascertaining the truth are not furnished by the account books themselves. The learned counsel insists that the referee had no right, upon the testimony before him, to charge *Henderson* with any more for supplies and provisions for the support of his family than the amount which appears upon the books of the firm. But there is ample evidence tending to show that there were groceries and provisions taken from the store of the firm, for the use of *Henderson's* family, which were not weighed, measured or charged. The referee has gone into a quite minute examination of *Henderson's* account for groceries, provisions, clothing, etc., which were used for the support of his family during the three years he had charge of the copartnership business at Sister Bay, and reached the conclusion that the amount shown by the books is quite inadequate for the purpose. We are not inclined, under the circumstances, to disturb the finding of the referee upon that point; for when it appears that goods were taken from the store which were not measured or weighed, and which were used in the defendant's family, it is impossible to rely upon the account as being accurate. From the nature of the case, other means or sources of information had to be resorted to to get at the truth of the matter; and that was what was done by the referee. The same remark may likewise be made with regard to the finding as to the amount which should be charged *Henderson* for servants' wages. The account of that matter is quite confused, and, notwithstanding the ingenious explanation of counsel with regard to it, is of that character that raises a violent presumption that it is not worthy of credit. We have already said it was the duty of *Henderson* to have kept accurate and intelligible accounts of all the trans-

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actions of the firm. The fact that he failed to do this furnishes a strong inference against him. The referee charged *Henderson* with \$20 for the board of an insurance agent, which had been improperly charged to the firm. It is admitted that this item should not be in the firm account, and the statement of *Henderson* that the firm had received credit for it in some freight charges was disregarded. There was no error in this finding of the referee.

There remains only one other matter in the report of the referee which we deem of sufficient importance to require notice. *Henderson* was charged with interest at the rate of seven per cent. upon the money in his hands belonging to the firm, for the time he held it. It is said that this was error; that in no event could he be charged with interest until a balance had been struck or an accounting had. In many cases this would undoubtedly be so, as this court decided in *Marsh v. Fraser*, 37 Wis., 149, and *Yates v. Shepardson*, 39 Wis., 173. But the reason of the rule fails here, because *Henderson* kept the account books, and knew, or had the means of knowing, the precise amount which he held in his hands belonging to the firm. He even professed to make a full statement of the property, profits, losses and condition of the firm at the closing of the business in the fall of 1874, which he gave to his copartners, but which statement was found not to be correct. Under these circumstances we therefore think it was not necessary that any formal balance should be struck in order that he might ascertain just what he had belonging to his copartners. He could have ascertained it, and paid over the amount, had he been disposed to be just.

In a case where one partner had withdrawn funds from the partnership contrary to the articles of copartnership, and employed them in trade, Chancellor KENT required him to account not merely for interest, but for the profits of that trade. *Stoughton v. Lynch*, 1 Johns. Ch., 467. This case comes fully within the spirit and reason of that decision. We

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therefore think it would be right to charge *Henderson* with interest upon the money in his hands.

We do not deem it necessary to make any further comments on the case.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to enter judgment on the report of the referee in accordance with the views expressed in this opinion.

THE MONITOR IRON WORKS COMPANY vs. KETCHUM and another. [On rehearing.]

REFERENCE. (1-3) *When compulsory reference proper.* (4) *Whether record must show that referee was sworn.*

1. If it appear from the pleadings that the trial of any issue of fact in a cause requires the examination of a long account, a compulsory reference may be ordered, under the statute.
2. The action was for work and materials, and the bill of particulars contained hundreds of items, each charged at a separate price. The answer did not deny that plaintiff did the work and furnished the materials, nor directly controvert the prices charged therefor; but it set up a special contract, by which plaintiff was to furnish defendants with certain machinery at a stipulated price, and alleged that such price had been fully paid, and that a large portion of the work and materials charged in said bill of particulars was done and furnished under such contract. It became necessary, therefore, to examine the account, item by item, to ascertain which items (if any) were, and which were not, included in the special contract. *Held*, that this made a compulsory reference proper.
3. The answer also contained a counterclaim for two sums of money, and another for goods, wares, merchandise, freight, work, labor and services, upon which issue was joined. *Held*, that the issues on the counterclaim alone would probably justify a compulsory reference.
4. The mere fact that it *does not appear from the record* that the referee for trial was *sworn*, is not ground for reversal. *Gilbank v. Stephenson*, 31 Wis., 592.
5. The decision upon the first hearing of this cause (44 Wis., 126), as to the points there considered, adhered to.

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APPEAL from the Circuit Court for *Brown* County.

For the appellants, there was a brief by *Hudd & Wigman*, and oral argument by *Mr. Hudd*.

For the respondents, there was a brief by *Hastings & Greene*, and oral argument by *Mr. Hastings*.

LYON, J. A former decision of this cause was inadvertently reported in 44 Wis., 126, after a reargument had been ordered. The statement of the case there made will not be repeated.

The circuit court referred the cause to a referee to hear, try and determine. The reference was compulsory, and the question of its regularity, or the power of the court to make it, was not raised on the former argument. The reargument was granted mainly upon that question.

If the trial of any issue of fact in the cause required the examination of a long account, the reference was proper. *Tay. Stats.*, 1499, § 25; *R. S.*, 761, sec. 2864; *Supervisors v. Dunning*, 20 Wis., 210. The circuit court necessarily had to determine from the pleadings alone whether such examination was required; and if the fact appears from the pleadings, that is sufficient.

The action is for work and materials, and the bill of particulars contains scores, even hundreds of items, each charged at a separate price. It is not denied in the answer that the plaintiff did the work for the defendants and furnished the materials charged; and the prices charged therefor are not controverted. But the answer states a special contract by the plaintiff to furnish certain machinery to the defendants at a stipulated price, which had been paid in full; and it is alleged therein that a large portion of the work and materials charged in the bill of particulars was done and furnished under the special contract.

It was unnecessary to examine the items of the account to ascertain whether the plaintiff did the work and furnished the materials charged, or whether the prices charged therefor were

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reasonable and just. All this stood admitted by the defendants. But it was necessary to examine the account, item by item, to ascertain which of the items (if any) were included in the special contract, and which were not. As was observed in *Carpenter v. Shepardson*, 43 Wis., 406, the admissions of the answer "tend to abbreviate an examination of the account, but still leave an account to be examined."

The answer also contains a counterclaim for two sums of money, and another for goods, wares, merchandise, freight, work, labor and services, upon which issue is taken by a reply denying the same. Presumably a large number of items (or a long account) are included in these counterclaims. Probably the issues on the counterclaims alone would justify a compulsory reference under the statute. *Carpenter v. Shepardson*, 46 Wis., 557.

It must be held, therefore, that the cause was properly referred.

It is also assigned as error that the record fails to show that the referee was sworn to the proper discharge of his duties as such. On the authority of *Gilbank v. Stephenson*, 31 Wis., 592, it is sufficient to say upon this point that the record fails to show that the referee was not so sworn. If the oath is required, it must be presumed that it was duly made.

The learned counsel for the defendants insisted, on the reargument, that the first opinion does not dispose of all the controverted questions in the case. Since the first argument the whole case has been carefully reexamined, and we have reached the conclusion that it was correctly decided in the first instance.

An extended discussion here of the testimony or the law of the case would be profitless. It must suffice to say generally, that, in our opinion, it was the duty of the defendants, under the contract, to prepare the foundation for the machinery; that they did prepare it under the superintendence of one Benjamin, who was their agent or employee for that purpose;

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that the defendants were responsible for the delay in starting their mill, except for three days, for which the referee allowed them damages at the stipulated rate; that if there was any defect in the machinery, the defendants failed to perform the conditions precedent to a recovery therefor, stipulated in the contract; that the items of plaintiff's account allowed by the referee were not included in the special contract; and that the referee allowed the defendants all of their counterclaims which they proved. In short, we find no ground for disturbing the report of the referee or the judgment founded upon it.

By the Court.— Judgment affirmed.

COLEMAN VS. THE PESHTIGO COMPANY.

Limitation of Action: Trespass to State Lands.

The statute limiting the time for bringing an action to recover damages for an injury to property (R. S., sec. 4222), runs against a right of action *in the state* in the same manner as against a right of action in a private person (sec. 4229); and one who purchases lands of the state, while he takes therewith (under ch. 520 of 1865) whatever rights of action the state may have for past trespasses upon such lands, cannot recover for a trespass upon which the period of limitation had run while title was in the state.

APPEAL from the Circuit Court for *Oconto* County.

Action to recover damages for trespasses upon lands while the same belonged to the state. Plaintiff, as patentee of the lands, had succeeded under the statute (ch. 520 of 1865; Tay. Stats., 630, § 56) to all the rights of action of the state for such trespasses. It appeared from the complaint that the trespasses constituting the second cause of action were committed more than six years before the commencement of the action, and defendant demurred to that cause of action upon that ground. From an order sustaining the demurrer, plaintiff appealed.

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For the appellant, there was a brief by *Webster & Brazeau*, and oral argument by *Mr. Webster*:

The statutes of limitation do not apply to the state, in the absence of an express provision to that effect. *Lindsey v. Miller's Lessees*, 6 Peters, 666; *Thomas v. Hatch*, 3 Sumner, 170; *U. S. v. Hoar*, 2 Mason, 312; *Stoughton v. Baker*, 4 Mass., 528; *People v. Gilbert*, 18 Johns., 227; *U. S. v. White*, 2 Hill, 59; *Cincinnati v. First Presb. Church*, 8 Ohio, 309; 11 id., 416. Sec. 26, ch. 138, R. S. 1858, under which it is claimed that the second cause of action is barred, merely provides that the limitations prescribed in that chapter shall apply to actions brought "*in the name of the state or for its benefit*," in the same manner as actions by private parties. Being in derogation of the common law, this statute must receive a strict construction (Angell on Lim., 24; *Scott v. Hickox*, 7 Ohio St., 94); and, so construed, it does not include this action, by a private person for his own benefit. It cannot be said that there was no right of action in the state when plaintiff purchased; for the state could have sued and recovered unless the defendant had expressly pleaded the statute as a defense. The state had therefore an assignable right; and when the assignee of that right sues in his own name and for his own benefit, the language of the statute does not permit defendant to set up the statutory bar. Several decisions of this court are cited to show that the lapse of the period of limitation not only affects the remedy but destroys the right. This principle, properly understood, need not be contested; but it merely signifies that the statute, if invoked as a bar to the right, will have that effect, while if not so invoked it has no effect. If the facts constituting the bar appear on the face of the pleading, no such effect will be given them, unless sought by the adverse pleadings. R. S. 1858, ch. 138, sec. 1; *Howell v. Howell*, 15 Wis., 55. Ch. 520, Laws of 1865, under which the plaintiff's title was obtained, provides that "any person who shall hereafter

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enter and receive a patent for any state land, shall thereby also acquire the right to all timber, lumber, trees . . . or other materials cut upon or removed from such land before the issue of such patent, unless the same shall have been cut or removed with the assent of the proper state authorities, or sold by the state; and he may seize, sue for and recover such materials *as if the same had been cut or removed from such land after the issue of such patent.*" It further provides that the person so obtaining the patent "may also bring an action for any trespass upon or other injury to such lands, committed before such patent shall issue, against the person or persons committing such trespass or other injury, in the manner and with like effect, and he shall be entitled to like damages, *as if such trespass or other injury had been committed after the patent had issued.*" The legislature could not have declared more plainly that the statutory limitation should not commence to run against any rights referred to in that act, until the patent issued; and the act in effect repealed any provision of former limitation acts in conflict with it. See *Trustees v. Campbell*, 16 Ohio St., 11; *Des Moines v. Harker*, 34 Iowa, 84.

For the respondent, there was a brief by *Hastings & Greene*, and oral argument by *Mr. Hastings*:

1. After the time prescribed for commencing an action has elapsed, the statute not only affects the remedy, "but directly destroys the right itself." *Sprecher v. Wakeley*, 11 Wis., 432; *Knox v. Cleveland*, 13 id., 245; *Brown v. Parker*, 28 id., 21-27. 2. The later statute cited by the appellant's counsel does not repeal sec. 26, ch. 138, R. S. 1858, by which statutory limitations run against the state. Repeals by implication are not favored; and no language used in the later statute has any reference to the period of limitation. The clear intention of the legislature was merely to give the patentee the same rights that he would have had if he had obtained the patent before the

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trespass was committed. If the other construction should prevail, the anomaly would be presented of a grantor conveying a right not possessed by him at the time of the grant.

ORTON, J. The demurrer to the second cause of action was properly sustained, for the reason that six years had expired since it accrued.

That the six years had expired while the property, and the cause and right of action growing out of it, were in the state, and that six years had not expired since the state sold the land and its right of action for past trespasses thereon to the plaintiff, would make no exception to the operation of the statute, which is general in its provisions, and embraces all causes of action of this nature for the recovery of which "the action *must* be commenced within six years after the cause of action accrued." Sections 4219 and 4222, R. S. 1878. The language of these sections, as well as of section 4229, is so explicit that it is difficult of comprehension how the exception contended for by the learned counsel of the appellant could have been intended by the legislature, or could be made to exist by any construction of the language used, however technical or strict.

The language of the last section is: "The limitations prescribed by this chapter shall apply to actions brought in the name of the state, or for its benefit, *in the same manner as to actions by private parties.*" The meaning is very obvious, if we change the language, but not its legal effect, to read, "shall apply to all causes of action belonging to the state;" or, in other words, the six years' statutory limitation shall run against the state in the same manner and in the same actions as against private parties. Chapter 520, Laws of 1865, operates in respect to past trespasses on the lands of the state, and was obviously intended to operate, only so as to assign the right of action for the same to the purchaser of the land so far as such right of action existed in the state, and not barred

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by the statute of limitation of six years. The argument of the learned counsel is able and ingenious, but fails to obscure the plain and obvious meaning of these statutes.

By the Court.—The order of the circuit court is affirmed, with costs.

MILLEDGE VS. COLEMAN.

TAX TITLES. (1) *Limitation of action: what defects in sale cured.* (2) *Form of tax deed.* (3) *Form of acknowledgment of tax deed.*

1. While it was illegal to include the price of a U. S. revenue stamp (to be affixed to the certificate of sale) in the amount to make which land was sold as for nonpayment of taxes, and the deed might have been avoided for such excess before the three years limitation of the statute expired (*Barden v. Supervisors*, 33 Wis., 445; *Baker v. Supervisors*, 39 id., 447), yet the validity of the sale cannot be questioned on that ground *after* the time limited has expired.
2. A tax deed, after reciting the sale of the land to the county, further recites that the certificate was by the county treasurer assigned to X. for a specified sum, "which sum was the amount of taxes assessed and due and unpaid on said tract of land, together with costs and charges of such sale due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser" of the certificate. *Held*, that this is a sufficient compliance with the statute which requires the deed to show the amount for which the land was sold.
3. The certificate of acknowledgment of a tax deed states that the clerk of the board (naming the person by whom, as clerk, the deed purports to be executed) "came personally before me, to me known to be the person so described in the foregoing instrument, and acknowledged that the same was executed freely and voluntarily, for the uses and purposes therein mentioned." *Held*, that this sufficiently shows an acknowledgment, by said clerk, that the deed was executed *by him*.

APPEAL from the Circuit Court for *Oconto* County.

Ejectment. Plaintiff appealed from a judgment in favor of the defendant. The case will appear from the opinion.

For the appellant, there were separate briefs by *Webster &*

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Brazeau, his attorneys, and *L. S. Dixon*, of counsel, and oral argument by *Mr. Webster* and *Mr. Dixon*.

For the respondent, there was a brief by *Hastings & Greene*, and oral argument by *Mr. Hastings*.

COLE, J. The sole question in this case arises upon the statute of limitations set up in the answer. The action is ejectment, the plaintiff claiming title under a patent from the state. The defendant claimed the premises by virtue of a tax deed, which had been recorded more than three years before the commencement of the action. The court below found as a fact, that to the amount of all legal taxes and charges for which the premises were liable to be sold, the county treasurer added five cents to pay for a United States revenue stamp to be affixed to the certificate of sale, and that this sum was included in the amount for which the premises were sold.

Now it is insisted by the learned counsel for the plaintiff, that because five cents to pay for a revenue stamp was included in the amount for which the land was sold, the tax sale was void, and the limitation did not run upon the tax deed. The position is briefly this: the statute expressly speaks of "land which has been sold and conveyed by deed for nonpayment of taxes;" and therefore, when, as in this case, the sale was in whole or in part for that which was not a tax, and which, under no circumstances, could be a tax, the sale is not for taxes, and the deed is not within the words nor intent and meaning of the statute.

We are not able to concur in this construction of the statute. It is admitted at the outset that the county treasurer had no legal authority to include in the amount for which the land was sold, five cents for a revenue stamp, and that the tax deed could have been avoided for this illegal excess before the statute had run upon it. *Barden v. Supervisors*, 33 Wis., 445; *Baker v. Columbia County*, 39 Wis., 447. So likewise would the sale and conveyance have been avoided if the tax-

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ing officers had included an illegal excess for fees, either intentionally or through a mistake of the law. *Kimball v. Ballard*, 19 Wis., 601; *Warner v. Supervisors*, id., 611; *Pierce v. Schutt*, 20 id., 423. And it would be as accurate and just to say in the one case as in the other that the land had not been sold for taxes, because there was an illegal excess or charge included in the amount for which the land was liable to be sold. In the case before us, the land was sold for \$8.08, of which \$8.03 were confessedly legal taxes and legal charges. It is quite true the land was sold for a gross sum, a part of which was legal and a part illegal. But we have no doubt there was a sale for the nonpayment of taxes, within the meaning of the statute. If the limitation does not apply to the deed in this case, neither would it apply to any case where there was included in the amount for which the land was sold an illegal excess arising from the mistakes of the taxing officers, in extending the tax, or where there was an erroneous charge for fees, whether made intentionally, or through mistake of law.

While the validity of the sale and conveyance is an open question, this illegal excess or any other irregularity in the tax proceedings may be shown in avoidance of the deed; but when the limitation has attached, the deed cannot be impeached upon any such ground. This is the view which has uniformly been taken of the statute by this court in the cases which have come before it; and to adopt now the construction contended for by plaintiff's counsel would disturb numerous titles. In the very recent case of *Oconto Company v. Jerrard*, 46 Wis., 317, the effect of the tax deed where the statute had run was very fully considered. In that case there was no pretense that the tax for which the deed was issued proceeded upon a regular, fair and equal assessment of the property to be taxed. A more fundamental and fatal defect in the tax proceedings than this could not well exist, since a valid assessment is the foundation of the tax. In answer to the argument that the

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statute was not intended to apply to such a case, and that the deed could be impeached for such a radical defect, the chief justice uses this language: "The respondents had their day to impeach the tax proceeding and avoid the tax deed. Then they might have said that the groundwork was so defective that there was no tax, and that the deed was therefore no tax deed. This they did not then do, and they are now too late to do it. They suffered the statute to purge the tax proceedings of all defects, to raise the tax deed above impeachment. Their objections may be all well founded, but they come out of time. What the respondents might have said, they cannot now say. The statute has left them like one estopped to speak the truth, because they did not speak it when they might.

"That has been the construction uniformly given by this court to the statute of limitations in relation to tax deeds. It has been uniformly held, in a multitude of cases, that, as against the grantee of a tax deed, the statute puts at rest all objections against the validity of a tax proceeding, whether resting on mere irregularity or going to the groundwork of the tax. The statute makes a deed, valid on its face, *prima facie* evidence, as soon as executed, of the regularity of all the proceedings, from the assessment of the land, inclusive, to the execution of the deed; and the effect of all the decisions is, that when the statute has run in favor of the grantee, the deed becomes conclusive to the same extent. The terms of the statute bar any action to recover the possession of land sold and conveyed by deed for nonpayment of taxes; and the learned counsel of the respondents contends that, to bring a tax deed within the statute, the validity of the tax and of the sale must be established. Such a construction would go far to make the statute a dead letter. The statute was designed to protect things *de facto*, not things *de jure*. When there has been an actual attempt, however defective in detail, to carry out a proper exercise of the taxing power, the statute applies; and the trouble with the argument is, that in such

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a case, saving the instances excepted by the statute itself, after the statute has run, the tax deed itself conclusively establishes the validity of the tax and of the sale."

No remarks could more satisfactorily meet and dispose of the argument on the statute of limitations, which was made in this case, than the above; and nothing need be added to them.

There are one or two minor objections to the deed, which remain to be noticed. It is said that the deed is void on its face because it does not show, as the statute requires, the amount for which the land was sold. A mere examination of the deed sufficiently shows that this objection is not well taken; for, after describing the land which was sold for the nonpayment of taxes, by the county treasurer, at the time and place named, to Oconto county, the deed recites that the certificate was "by its treasurer assigned to *S. A. Coleman* for the sum of \$8.08 in the whole, which sum was the amount of taxes assessed and due and unpaid on said tract of land, together with the costs and charges of such sale due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser" of the tax certificate. Another objection taken to the deed is, that its execution was not properly acknowledged by the clerk. The criticism upon the acknowledgment is, that it does not show that the clerk, Grumert, acknowledged that the deed was executed by him. It seems to us the objection is hypercritical. The officer before whom the acknowledgment was taken certifies that the clerk of the board (naming him) came personally before him, "to me known to be the person so described in the foregoing instrument, and acknowledged that the same was executed freely and voluntarily, for the uses and purposes therein mentioned." This language plainly implies that the clerk who made the acknowledgment, himself executed the deed.

It follows from these views that the judgment of the circuit court must be affirmed.

By the Court. — Judgment affirmed.

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BABKA VS. ELDRED and another, imp.

LIEN. *No lien upon lath, for labor, under ch. 154 of 1862.*

1. Ch. 154 of 1862 (Tay. Stats., 1768, § 25) in terms gives a lien on "logs and timber," for labor performed thereon, whether done for the owner or his representative, or for a stranger; but it gives no lien upon *lumber* for such labor; and such a lien can only be enforced under the general statute concerning the liens of mechanics and others (R. S. 1858, ch. 153, sec. 12), which applies only to labor performed for or on account of the owner or his agent or assignee, or a subcontractor.
2. Laths are lumber, and are *not timber* within the meaning of the act of 1862.
3. In this action for a lien for work performed in a county to which the act of 1862 applies, the court found that plaintiff worked for the defendant W. "in sawing slabs out of logs for lath;" that a certain sum was due him for such work; and that "the logs and lath upon which said labor was performed, were then and are the property of defendants E." *Held*, that these findings do not show plaintiff entitled to a lien upon the *lath*, as against the defendants E.
- [4. The constitutionality of the act of 1862, or of the provisions thereof giving justices of the peace jurisdiction of actions to enforce the liens there provided for, not here considered.]

APPEAL from the Circuit Court for *Oconto* County.

This action was brought before a justice of the peace, to enforce a laborer's lien upon a quantity of lath. It is alleged in the complaint, that between August 3d and October 11th, 1877, the plaintiff performed work for the defendant Wirt, in manufacturing lath out of pine logs, in Oconto county, at an agreed price; that Wirt is indebted to the plaintiff for such work in the sum of \$35; "that the said logs, whereon the plaintiff performed the labor and services aforesaid, are now lying in the lumber yard of the defendants *Anson* and *Howard Eldred*, in the city of Oconto, in Oconto county, Wisconsin, manufactured into lath, done up in bundles;" that defendants *Eldred* are the owners of such lath, subject to the plaintiff's lien thereon; and that the plaintiff duly filed his statement or

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petition for a lien thereon in the office of the clerk of the circuit court for Oconto county, October 31, 1877.

The justice rendered a personal judgment against Wirt for the amount of the claim, and adjudged the same a lien on the lath. The defendants *Eldred* appealed to the circuit court, and the cause was there tried by the court, a jury having been waived. The court found that the plaintiff worked for Wirt "in sawing slabs out of logs for lath," in Oconto county; that there was due the plaintiff \$35 for such work; and that "the logs and lath upon which said labor was performed, were then and are the property of the defendants *Eldred*." The court also held, as conclusions of law, that the plaintiff was entitled to a personal judgment against Wirt for the above sum, and was also entitled to have the same adjudged a lien upon the lath; and judgment was entered accordingly. The defendants *Eldred* appealed from the judgment.

For the appellants, there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *D. S. Wegg*.

W. H. Webster, for the respondent.

LYON, J. It is alleged in the complaint that the plaintiff manufactured logs into lath for the defendant Wirt. The finding is, that he sawed slabs out of logs for lath; and the testimony supports the finding. The question arises, whether such labor is included in the provisions of chapter 154, Laws of 1862, entitled "An act providing for a lien for labor and services on logs and lumber in certain counties," which act was extended to Oconto county, by chapter 100 of 1867 (Tay. Stats., 1768, § 25).

Although the word *lumber* is found in the title, it does not occur in the body of the act of 1862. The term "logs and timber" is employed therein several times, to express the subject matter of the act, and is evidently so employed *ex industria*. The general statute concerning liens of mechanics and others (R. S. of 1858, ch. 153, sec. 12) gives a lien on logs, timber

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or *lumber*, to any person performing labor thereon for or on account of the owner, agent or assignee thereof. The special act assumes to give the lien on logs and timber absolutely, without regard to the question whether the work was or was not done for the owner or his representative, and gives such lien precedence over all other claims on the property. Under that act the owner may be divested of his property without having authorized work to be done upon it. On the other hand, the general law protects the owner by restricting the lien to cases in which the labor is performed for the owner, agent or assignee, or, probably, for a subcontractor, under the restrictions of the statute. Thus, under the general law, the labor must be performed for the owner, or some person who represents him, or there can be no lien.

While the property remains in the form of logs or timber, it can easily be traced, described and identified by reference to location and marks; but after it is cut or sawed into lumber, it becomes more portable, more liable to be scattered, and more difficult to describe or identify. It also then becomes more peculiarly an article of commerce, and more liable to pass into the hands of innocent purchasers.

It may well be the legislature were of the opinion that while the property remained in the form of logs or timber, comparatively little injustice would be done the owner by the severe remedy of the special act of 1862; but that after the property became *lumber*, the owner should not be subjected to a law so severe in its operation; hence the omission of the word *lumber* from the body of the act of 1862.

These considerations lead us to conclude that the act of 1862 gives no lien on *lumber* for work performed on it, either in its manufacture or otherwise; but that such a lien can only be enforced under the general statute.

It is not denied that lath is *lumber*; we think it is not *timber* within the meaning of that word in the act of 1862. We are not aware that these words have acquired any peculiar

meaning in the law; and they must, therefore, be construed and understood according to the common and approved usage of the language. R. S., 1145, sec. 4971. Thus construed, we cannot doubt that *timber* means the body, stem or trunk of a tree, or the larger pieces or sticks of wood which enter the frame-work of a building or other structure, excluding the plank, boards, shingles or lath which may be used to complete the structure. See Webster's Dic. These views find support in *Battis v. Hamlin*, 22 Wis., 669, where it seems to have been assumed that shingles are lumber, and are not included in the provisions of chapter 215, Laws of 1860, which, in all essential particulars, is like the act of 1862, except that it relates to other counties. If shingles are not *timber*, within the meaning of those acts, certainly lath is not.

We conclude that the lien sought to be enforced in this action could only be enforced under the general statute above cited. R. S. 1858, ch. 153.

As before remarked, section 12 of that chapter only gives the lien to one who performs labor for the owner, agent or assignee, or a subcontractor. The record in this case fails to show that Wirt was the owner, or that he sustained either of the above relations to a lien on the lath.

The constitutionality of the act of 1862, and of the provision therein giving justices jurisdiction of cases like this, was somewhat discussed at the bar; but we are unwilling to decide these questions without further argument.

By the Court.—The judgment is reversed, and the cause remanded for a new trial.

The following opinion was filed on a motion for a rehearing:

LYON, J. A motion for a rehearing of the cause has been made on behalf of the appellants, based upon a doubt of their counsel as to whether the opinion leaves the question of the validity of the act of 1862 open for future adjudication.

In denying the motion it is only necessary to say that the

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opinion, and the judgment of reversal to be entered pursuant thereto, do not determine that question, but the same is open for argument and adjudication whenever it arises in this court.

By the Court.—Motion denied, with twenty-five dollars costs.

CULBERTSON VS. COLEMAN. (Cross Appeals.)

PROOF OF TITLE TO LAND. (1) *Evidence of title by patent from U. S.: Certificate of entry: Presumption.* (2) *Constitutional law: Act authorizing sale of decedent's land by executor, held invalid.* (3, 4) *Effect and proof of deeds of confirmation by true owners.*

1. A certificate of the register of a U. S. land office in this state, in the form prescribed by sec. 4166, R. S., is evidence that the person therein named became entitled, by the purchase there certified, to a patent from the United States of the land described; and after a lapse (in this case) of twenty years from the entry and purchase, it will be *presumed* that a patent was issued to the purchaser, as the law requires.
2. Ch. 51, P. & L. Laws of 1866, in terms empowers J. W., executor of the last will of F. B. W., deceased, to sell all real estate in Wisconsin of which F. B. W. died seized; and it contains no recitals showing that the parties interested consented to the grant of such power of sale, or were under any disability, or showing any reason for such grant; nor was any reason therefor shown at the trial hereof, in which plaintiff claimed under a deed of such alleged executor. *Held*, that, under the evidence, the act appears to be *invalid*, as an attempt to transfer by special act the property of a person not under disability, without his consent, to another person.
3. The executor having undertaken to sell and grant the lands of said F. B. W. on behalf of the persons then interested in them, deeds of the land from such persons to the executor's grantee, confirming the sale, would take effect as of the date of the executor's deed, except as to persons claiming under such parties by deed subsequent to the executor's sale and prior to such deeds of confirmation.
4. But deeds of confirmation purporting to be executed by heirs and residuary legatees of the testator are insufficient, without proof that the title in fact passed to such grantors.

APPEALS from the Circuit Court for *Oconto* County.

The case is thus stated by Mr. Justice TAYLOR:

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"These appeals are taken in the same action, of ejectment for the recovery of three separate parcels of land. On the trial in the court below, the plaintiff obtained a verdict for one of the parcels described in his complaint, and the defendant had a verdict in his favor for the other parcels. The plaintiff appealed from so much of the judgment as found that the title to the two parcels was in the defendant; and the defendant appealed from that part of the judgment which found that the plaintiff had title to the remaining parcel. Both cases were argued together, and but one opinion will be necessary in disposing of the two appeals.

"The plaintiff, to show title to the lands on his part, offered in evidence two certificates of the register of the land office at Menasha, in the form prescribed in section 4166, R. S. 1878, showing that a part of the lands in question had been entered, purchased and paid for by Stephen H. Hicks on the 20th day of June, 1856, and part had been so entered, purchased and paid for by one John W. Greenman on the 12th day of July, 1856. These certificates were objected to by the defendant as not being evidence of a legal title to the lands in said Hicks and Greenman, but this objection was overruled by the court. The plaintiff then traced his title through several conveyances from Hicks and Greenman, and their grantees, to one Thomas A. Follette. He then introduced a mortgage dated the 7th day of September, 1857, given by the said Follette and wife to William Kellogg, to secure the payment of \$1,346.76, payable one year from date; and then introduced a sheriff's deed bearing date December 31, 1859, in which deed Francis B. Webster, of Girard, Erie county, Pennsylvania, was grantee, showing that these lands were sold by the sheriff of Winnebago county in pursuance of a judgment of foreclosure rendered in the circuit court of said county. This deed recites an action between one Francis B. Webster as plaintiff, and Follette and wife and several others as defendants, and that the mortgage foreclosed in such action bore date on the 7th

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day of September, 1857, but it does not further identify such mortgage as the one executed by the said Follette and wife to the said William Kellogg. Several objections were made by the defendant to the introduction of this deed; but, as we have concluded that the judgment in favor of the plaintiff must be reversed upon other grounds, and as it is probable that upon a new trial the plaintiff will be able to avoid many, if not all, the objections made to the introduction of this deed, by further evidence, we do not feel called upon to determine whether such objections were or were not well taken.

“After the introduction of the sheriff’s deed to Francis B. Webster, the plaintiff offered in evidence a deed purporting to be made by one James Webster, as executor of the last will and testament of Francis B. Webster, deceased, to the plaintiff. This deed bears date the 11th day of February, 1867, and purports to convey the lands in question to the plaintiff. In connection with said deed, plaintiff also offered in evidence chapter 51 of the Private and Local Laws of this state for the year 1866. To the introduction of this deed, the defendant interposed the following objections: *first*, that there is no authority shown, by the production of the last will and testament of Francis B. Webster, that his executor had power to sell said lands; *second*, that there is no evidence before the court showing that James Webster is the executor of the last will and testament of Francis B. Webster, deceased; *third*, that there is no proof of the probate of the will of Francis B. Webster; *fourth*, that there is no proof of any authority in James Webster to act as the executor of said Francis B. Webster; *fifth*, that chapter 51, P. & L. Laws of 1866, is unconstitutional and void. These objections were all overruled, and the defendant excepted.”

For the plaintiff, there was a brief by *Tracy & Bailey*, and oral argument by *Mr. Tracy*.

W. H. Webster, for the defendant.

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TAYLOR, J. It is evident that the legislature intended, by the passage of sections 4165 and 4166, to make certificates like those introduced by the plaintiff in this case evidence of a legal title. Section 4165 made the receiver's receipt or certificate of purchase, and the official certificate of any register or receiver of the entry or purchase of any land, or the location of any land by any land warrant, presumptive evidence that the title to the lands described in such certificate or receipt vested in the person named therein. Section 4166 provides that the register's certificate that, from the books and records of the United States land office, it appears that on a certain date some person, naming him, entered, purchased and paid for a certain tract of land described in such certificate, shall be received as presumptive evidence of the facts therein stated. The former section made the certificate of the receiver or register evidence of title, and this section makes the certificate therein prescribed evidence that the books and records in the land office show that the person therein named purchased, entered and paid for the land therein described. This last certificate is higher evidence of the fact that the land was entered and paid for by the person described therein, than the certificate prescribed by the former statute. And although section 4166 does not declare that such certificate shall be presumptive evidence of title in the person described therein as the purchaser, still this court will take notice of the fact that, under the laws of the United States, every person who has entered, purchased and paid for a tract of land at the United States land office, is entitled to a patent for the lands so entered, purchased and paid for, unless such entry be set aside for cause shown; and we must presume, therefore, that after the lapse of more than twenty years after such entry and purchase, such patent has issued to the purchaser as the law requires. The court properly overruled the objection to this evidence.

It will be seen that the plaintiff relied entirely upon chap-

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ter 51, P. & L. Laws of 1866, for the authority of James Webster to make the deed to him, and gave no other evidence of his right to make such deed, and convey the lands of Francis B. Webster, deceased, except that derived from this statute. There was no proof, unless the statute furnished such proof, that Francis B. Webster ever made a last will and testament, nor that James Webster was his executor. The act is entitled "An act to authorize the executor of the last will and testament of Francis B. Webster, deceased, to sell real estate." Section 1 of the act, which confers the power to sell, reads as follows: "Section 1. James Webster of Girard, Erie county, Pennsylvania, executor of the last will and testament of Francis B. Webster, deceased, is hereby authorized and empowered to sell and dispose of all real estate, of every nature and kind, situate in the state of Wisconsin, of which said Francis B. Webster died seized, and to sell and dispose of any interest which said Francis B. Webster had at the time of his decease, or the estate of said Francis B. Webster now has, in any real estate situate in the state of Wisconsin, and upon such sale or sales to execute and deliver all necessary instruments of conveyance or transfer, and all necessary deeds, in the usual form, with or without the usual covenants of warranty."

There are no recitals in the act showing any reason for conferring the power of sale on the executor — that the parties interested consented to the grant of such power or were under any disability of any kind; nor was any reason for the sale shown upon the trial. Upon this state of facts we have come to the conclusion that the act is unconstitutional and void. It may be conceded that previous to the amendment of our constitution, adopted November, 1871, which, in express terms, forbids the passage of any special or private law "authorizing the sale or mortgage of real or personal property of minors or others under disability," the legislature of this state might have constitutionally passed special acts authorizing guardians of minors or insane persons,

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or others under disability, to sell the property of their wards; but from the concession of this power to the legislature it does not by any means follow that it may, by special act and without consent, authorize A. to sell and convey the lands of B., he being at the time under no disability, and no consent to or necessity for such authorized sale being shown. An attempt on the part of the legislature to transfer the property of A. to B. without A.'s consent, either with or without compensation, is a violation of the spirit if not the letter of the constitution of this state, which provides that "the property of no person shall be taken for public use without just compensation therefor" (article I, sec. 13, Const. of Wisconsin; *Newcomb v. Smith*, 2 Pin., 183); and if this act had been passed since July 28, 1868, it would have been a clear violation of the fourteenth amendment of the constitution of the United States, which provides, among other things, "that no state shall deprive any person of life, liberty or property, without due process of law." *Rowan v. State*, 30 Wis., 129, 146.

It is quite clear, within all the decisions upon that question, that the mere fiat of the legislature transferring the property of A. to B. is not due process of law within the meaning of that provision of the constitution of the United States. The act in question, standing alone and unexplained, is nothing more nor less than an arbitrary attempt on the part of the legislature to authorize an individual, who does not appear to have any estate or right to the real estate in question, either as trustee or otherwise, to sell and convey the title to the same to such persons, and for such price, as he may deem expedient; nor does it attempt to provide that he shall turn over the proceeds of the sales to the persons holding the title of the lands sold. The fact that the act of the legislature calls him the executor of the last will and testament of Francis B. Webster, deceased, does not change the nature of the act. His being executor of the will of a deceased person does not

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prove that he had any interest or estate in the real property of the deceased, or any power to sell the same.

The exact question presented in this case was before the court of appeals of the state of New York in the case of *Powers v. Bergen*, 6 N. Y., 358, and, after a full discussion of the case, an act similar in most respects to the one here in question was held void. In the opinion in that case the court say:

“Here the sovereign and absolute power resides in the people, and the legislature can only exercise such powers as have been delegated to it. The right of eminent domain, or inherent sovereign power, gives the legislature the control of private property for public uses, and only for such uses. In such cases the interest of the public is deemed paramount to that of any private individual. And yet even here the constitution of the United States (article 5 of the amendments) and the constitution of this state (article 1, sec. 6), have imposed a salutary check upon the exercise of legislative power for that purpose, by providing that private property shall not be taken for public use without just compensation.

“It follows that if the legislature should pass an act to take private property for a purpose not of a public nature, as if it should provide, through certain forms to be observed, to take the property of one and give it (or sell it, which is the same thing in principle) to another, or if it should vacate a grant of property under the pretext of some public use, such cases would be gross abuses of the discretion of the legislature, and fraudulent attacks on private rights, and the law would clearly be unconstitutional and void. 2 Kent's Com., 340. If the power exists to take the property of one without his consent and transfer it to another, it may as well be exercised without making compensation as with it; for there is no provision in the constitution that just compensation shall be made to the owner when his property shall be taken for *private* use. The power of making contracts for the sale and disposition of

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private property for individual owners has not been delegated to the legislature, or to others through or by any agency conferred on them for such purpose by the legislature; and if the title of A. to property can, without his fault or consent, be transferred to B., it may as well be effected without as with a consideration. In *Wilkinson v. Leland* (2 Peters, 657), the late Judge STORY says: 'The fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least, no court of justice in this country would be warranted in assuming that the power to violate and disregard them — a power so repugnant to the common principles of justice and civil liberty — lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well being, without very strong and direct expressions of such an intention.' He added: 'We know of no case in which a legislative act to transfer the property of A. to B. without his consent has ever been held a constitutional exercise of legislative power in any state in the Union. On the contrary, it has been constantly resisted as inconsistent with just principles, by every judicial tribunal in which it has been attempted to be enforced.' "

In *Taylor v. Porter*, 4 Hill, 143, Justice BRONSON says: "The power of making bargains for individuals has not been delegated to any branch of the government, and if the title of A. can without his fault be transferred to B., it may as well be done without as with compensation." In the matter of *Albany Street*, 11 Wend., 149, Chief Justice SAVAGE says: "The constitution, by authorizing the appropriation of private property for public use, impliedly declares that for any other use private property shall not be taken from one and applied to the private use of another." Mr. Senator TRACY, in the same case, said: "The words should be construed as equivalent to a constitutional declaration that private property, with-

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out the consent of the owner, shall be taken only for public use, and then only upon a just compensation." This court, in the cases of *Newell v. Smith*, 15 Wis., 101, *Osborn v. Hart*, 24 Wis., 89, and *Newcomb v. Smith*, *supra*, evidently held to the doctrine announced by the courts of New York above referred to.

We fully concur in the conclusions arrived at by the court of appeals in New York in the case of *Powers v. Bergen*; and, without attempting any elaborate discussion of the question, we hold that the legislature has no power, arbitrarily and without the consent of an individual who is under no disability, to transfer his title to real estate to another, or to authorize some other person, not appointed by him, to make such transfer, and that the act in question, which attempted to effect such purpose, is void, and consequently no title passed to the grantees in the deed of the executor offered in evidence.

The counsel for the appellant and plaintiff attempted to supply the defect of title by introducing certain deeds purporting to be made by the heirs and residuary legatees of the deceased, Francis B. Webster. If the evidence in the case had shown that the parties to these deeds took the title to the lands of the deceased under his will, we would have no difficulty in holding that the grantee of the executor took the title from the date of his deed. The executor having undertaken to grant the lands of his deceased on behalf of those interested, a deed from them confirming such sale would take effect as of the date of the original deed, except as to persons claiming under such parties by deed subsequent to the sale by the executor and before the deed of confirmation. The deed of confirmation would be a ratification of the act of the executor, treating him as the agent of the parties interested, and would make his act good from its date, except as above stated. *Ladd v. Hildebrand*, 27 Wis., 135. But as the evidence does not show that the title of the real estate in question vested in the grantors named in the deeds of confirmation, the court cannot

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find that the title passed to the grantee of the executor. Had the will been introduced in evidence, it would then have appeared who were the holders of the legal title, and a good deed of confirmation from such parties would have made the plaintiff's title perfect. As the evidence does not show these facts, and as the executor's deed to the plaintiff is void, he has failed to show any title in himself to the lands described in the complaint, and the court should have directed a verdict for the defendant as to all the lands demanded.

By the Court.—So much of the judgment of the circuit court as is appealed from by *S. A. Coleman*, is reversed, and the cause is remanded for a new trial. And so much of the judgment of the circuit court as is appealed from by *William C. Culbertson*, is affirmed.

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CHATTEL MORTGAGE: REPLEVIN. (1) *Whether mortgagor can replevy goods after condition broken.* (2) *Extent of judgment in replevin, for mortgagee.*

1. Where the mortgagee of chattels takes possession after condition broken, the mortgagor, who has subsequently tendered the sum due on the mortgage, but has not kept the tender good by paying the money into court, cannot maintain replevin for the property. [But whether payment of the money into court would enable him to maintain the action, is not determined.]
2. The mortgagee from whom chattels have been wrongfully replevied, is entitled to judgment for their return, with any damages suffered from the taking, or for the amount of the mortgage debt; but cannot have judgment for the full value of the property, if that exceeds the mortgage debt and costs.

APPEAL from the Circuit Court for *Oconto County*.

Replevin. Plaintiff appealed from a judgment against him. The case will appear from the opinion.

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For the appellant, there was a brief by *A. Reinhart*, his attorney, and *Tracy & Bailey*, of counsel, and oral argument by *Mr. Tracy*. They contended that, when the mortgagor tenders, and the mortgagee refuses, the amount of the mortgage debt, the lien of the mortgage is discharged, though the debt remains. *Herman on Chat. Mortg.*, 468, 471, and cases cited in note 1, p. 46; *Legro v. Lord*, 10 Me., 161; *Spaulding v. Barnes*, 4 Gray, 330; *Jackson v. Crafts*, 18 Johns., 110; *Arnot v. Post*, 6 Hill, 65; *Hunter v. Le Conte*, 6 Cow., 728; *Farmers' Ins. Co. v. Edwards*, 26 Wend., 541; *Kortright v. Cady*, 21 N. Y., 343; *Doane v. Garretson*, 24 Iowa, 351; *Moynahan v. Moore*, 9 Mich., 9; *Van Brunt v. Wakelee*, 11 id., 177; *Caruthers v. Humphrey*, 12 id., 270; *Van Huseon v. Kanouse*, 13 id., 303; *Flanders v. Chamberlain*, 24 id., 305; *Eelov v. Mitchell*, 26 id., 503. There are cases which hold that, in the case of a *chattel* mortgage, the payment must be accepted in order to have this effect. So there are numerous *old* cases holding the same doctrine as to *real-estate* mortgages; but these are opposed to the whole current of modern authorities; and there is no logical reason for distinguishing between real-estate and chattel mortgages in this respect.

W. H. Webster, for the respondent:

After a default, the mortgagor of chattels has no legal interest in them, but merely an equity of redemption. *Nichols v. Webster*, 1 Chand., 203; *Flanders v. Thomas*, 12 Wis., 410-11. Even the mortgagor of *land* cannot maintain ejectment against the mortgagee in possession after default, but must bring his bill in equity to redeem. *Gillett v. Eaton*, 6 Wis., 30; *Tallman v. Ely*, id., 244; *Stark v. Brown*, 12 id., 572; *Hennesy v. Farrell*, 20 id., 42. Replevin bears the same relation to personal property that ejectment does to real. In *Musgat v. Pumpelly*, 46 Wis., 660, this court held that where the mortgagor of chattels, *remaining in possession* after default, tenders the amount of the mortgage debt and costs *before any demand* of possession has been made by the

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mortgagee, he may defend his possession on that ground, in replevin by the mortgagee, if the tender is kept good by *bringing the money into court*. This is equivalent to holding that if the tender had not been made until after demand by the mortgagee for possession, and still more if not made until after the mortgagee had obtained possession, the mortgagor must look to a court of equity for his remedy. But however that may be, plaintiff, not having brought or offered to bring the money into court, cannot be benefited by his tender. 5 Clark (Iowa), 460-481; 1 Head, 19; 5 Harrington (Del.), 17; 24 Ga., 211; 16 Tex., 461; 11 Ind., 532; 25 Pa. St., 354; 7 B. Mon., 279; 2 Gilm., 679; 2 Denio, 196, 344; 23 Barb., 490; 7 Paige, 344; 26 Wend., 541; *Kortright v. Cady*, 21 N. Y., 343; *Breitenbach v. Turner*, 18 Wis., 140.

COLE, J. This is an action by the mortgagor to recover possession of certain personal property. The defendant took possession of the property under a chattel mortgage, after default and condition broken. On the same day the plaintiff tendered to the defendant the amount due on the mortgage, with interest, and demanded the property, which amount the defendant refused to receive, and to deliver up the property, until another claim which he held against the plaintiff was paid. This action of replevin was at once commenced, the plaintiff claiming that the tender and refusal had the effect to extinguish the lien, and reinvest the title to the property in him. On the other hand it is claimed that after the default, where possession was taken under the mortgage, the title at law became absolute and perfect in the mortgagee; the plaintiff only having the right of redemption in equity, or the right to the surplus after sale and satisfaction of the mortgage debt and costs. *Flanders v. Thomas*, 12 Wis., 410. These adverse claims in respect to the rights of the mortgagor and mortgagee upon the tender and refusal, where possession has been taken by the mortgagee upon condition broken, raise a very interesting

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question, and one, so far as we know, which has never been directly passed upon in this court.

The doctrine of this court, as announced in many cases which have come before it, is that a chattel mortgage vests in the mortgagee a defeasible title in the mortgaged property, which becomes absolute at law on failure to pay at the stipulated time. But, while this is so, this court at the same time has affirmed the right of redemption in equity of the mortgagor, notwithstanding the forfeiture. But we have never had occasion to consider whether a tender after default, where possession had been taken by the mortgagee, has the effect to discharge the lien and revest the legal title in the mortgagor. The recent case of *Musgat v. Pumpelly*, 46 Wis., 660, was an action by the mortgagee against the mortgagor to recover possession of the mortgaged property. The defendant had remained in the possession of the property, and set up as a defense a tender of the amount of the mortgage debt, made after condition broken. It appeared that the defendant had kept the tender good by bringing the money into court. This court was inclined to the opinion that where there was a tender before a demand of possession was made by the mortgagee, this would constitute a good defense at law, on the ground that acquiescence by the mortgagee in the continued possession of the mortgagor, without any assertion of right on his part, must be deemed a waiver by the mortgagee of the strict legal forfeiture, according to the conditions of the mortgage; and that a tender before demand of possession has the same effect in law as though made on the day the money became due. At all events it was said that these facts offered a good equitable defense to an action by the mortgagee to recover possession, where the tender was kept good by the money being brought into court.

But the facts of the case before us are quite different from those appearing in the *Musgat* case. Here the mortgagee has asserted his right under the mortgage by taking possession of

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the mortgaged property on default. He is acting on the defensive, claiming to be the owner, and insisting upon all his rights under the mortgage. It is obvious that the plaintiff cannot recover in this action unless the effect of the tender, at the time and in the manner it was made, discharged the lien of the mortgage and reinvested him with the legal title. We are quite well satisfied that no such consequences resulted under the circumstances from the tender which was made. The tender has not been kept good by bringing the money into court.

In analogy to the rule laid down in some cases relating to real-estate mortgages, it is said that it was not necessary to bring the money into court in order to extinguish the lien of the mortgage; that where the only effect of a tender unaccepted is to discharge the lien, and not operate in the way of payment of the debt, it is not essential that the tender be kept good by bringing the money into court. But the strong intimation in the *Musgat* case is otherwise. There it was said "that a tender made by the mortgagor after condition broken, he being in possession of the mortgaged property, and keeping the tender good by bringing the money into court when the mortgagee brings the action," would amount to an equitable defense to such action; and we are very clear that nothing short of this will discharge the lien of a chattel mortgage after forfeiture, and reinvest the title in the mortgagor, where possession has been taken by the mortgagee. But we studiously and carefully refrain from expressing any opinion upon the question whether, even in such a case, if the mortgagor make a proper and sufficient tender, and keep it good, this will discharge the lien and be deemed equivalent to payment or tender according to the condition of the mortgage. It will be time enough to decide that question when a case arises which fairly presents it upon the record. We consequently hold that what was done by the mortgagor in this case did not have the effect to discharge the lien of the mortgage and reinvest the plaintiff with the title of the property.

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In this case the plaintiff had taken the property, and retained it during the pendency of the suit. The court below found that the defendant was the owner thereof at the commencement of the action, and entitled to the possession; that the plaintiff wrongfully took and retained possession of the same; that the property was of the value of \$1,000; and that the defendant's damage by reason of the wrongful taking and detention was fifty dollars. It was admitted that the amount due on the mortgage was \$442.95. The defendant had judgment for the immediate return and delivery of the property to him, and for fifty dollars damages for the taking and detention. In case a delivery of the property could not be had, the defendant had a judgment against the plaintiff and his sureties on the undertaking, for the value of the property, to wit, \$1,000, and fifty dollars damages for the taking and detention. The latter clause of this judgment is clearly erroneous. The defendant had his election, under the pleadings, to a judgment for a return of the property and the damages assessed for its taking and detention, or a judgment for the amount due on his mortgage, together with interest and costs. But in taking the alternative judgment, although the legal title to the property was in him, he could only recover to the extent of his mortgage lien, together with interest and costs; and, as his special interest was less than one-half of the value of the property, he had no right to a judgment for its full value. *Burke v. Birchard*, ante, p. 35. It seems to us it would be unjust to allow him to take a judgment in the alternative for a greater amount than his mortgage debt, together with interest and costs.

By the Court. — The judgment of the circuit court is reversed, and the cause is remanded with directions to that court to enter a modified judgment in conformity to this opinion.

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COUNTY BOARD AND COUNTY TREASURER. (1, 5) *Disqualification of members of county board to vote on resolution.* (2) *Discharge of principal releases surety.* (3) *Liability of county treasurer to county for drainage fund.* (4) *What majority required to pass resolution.* (5) *Case stated: Resolution not passed.* (6) *Quere as to power of county board in any case to release treasurer from legal liability.* (7) *Notes given on illegal compromise invalid.*

1. Members of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent; and this rule applies to a board of county supervisors.
2. The discharge or release of a county treasurer from his legal liability for funds in his hands would discharge also his sureties.
3. The county treasurer and the sureties on his *drainage-fund* bond are liable to the county for any conversion of the drainage fund by such treasurer, although the county holds that fund in trust for the towns entitled to it; and such sureties, being members of the county board, are therefore disqualified to vote upon any proposition to release the treasurer from his legal liability for a conversion of such funds.
4. To pass a resolution at a meeting of a county board, a number of persons *qualified to vote* upon such resolution, sufficient to constitute a majority of the whole board, must not only be present at the meeting, but must *actually vote* upon the resolution; and where the contrary fact appears, the resolution is treated as a nullity.
5. Where a county treasurer had converted drainage and other funds of his county, seven of the ten members of the county board were present, and voted upon a resolution to compromise with the treasurer by taking new securities for a smaller sum than that converted, and discharging the treasurer. Two of the seven were sureties on the treasurer's drainage-fund bond; and one of these voted for and the other against the resolution, which received five affirmative votes. *Held*, that the resolution was not passed.
- [6. Whether it is competent for a county board, in any case, to discharge the treasurer and his sureties from liability on his official bond, without a full compliance with its conditions, and (if so) what are the limitations of this power, or the conditions of its exercise, are questions not here considered.]
7. Notes given by the county treasurer, and a mortgage to secure them given by a third person, in pursuance of the scheme of compromise expressed in the resolution aforesaid, *held* invalid for want of a consideration.

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APPEAL from the Circuit Court for Oconto County.

The action is for the foreclosure of a mortgage executed by the defendant *Ben. R. Hall* to the county of Oconto, to secure the payment of four promissory notes, amounting to \$7,500, made to the county by the defendant Richard L. Hall.

The case was here on a former appeal from an order of the circuit court overruling a demurrer to the complaint. 42 Wis., 59. A sufficient statement of the complaint will be found in the report.

After the cause was remitted, the defendant *Ben. R. Hall* answered, alleging, among other things not necessary to be stated, that his codefendant Richard L. Hall was treasurer of Oconto county from January, 1863, to January, 1873; that during his last three terms of office he converted to his own use about \$69,000 of the funds of the county in his hands as such treasurer; that he received said funds mainly on sales of lands for nonpayment of taxes, and of tax certificates belonging to the county, and from the state treasurer upon the delinquent taxes collected by him for, and the drainage funds belonging to, the county; that a large portion of the moneys so embezzled belonged and was due to the several towns in the county, under various statutes, and a portion thereof was due to the state on account of state taxes apportioned to the county; and that the defaulting treasurer (the defendant Richard L. Hall) made a proposition to the plaintiff board of supervisors for a settlement and adjustment of his defalcation, in which he offered to pay the county in various ways (partly in county orders) \$32,500, of which amount \$7,500 was to be paid in four equal annual installments, the payment thereof "to be secured by real estate or personal security—the said security as above to be satisfactory to the committee of the board." The proposition concludes as follows: "When the above orders and notes are delivered to the committee, the same to be received in full payment and satisfaction of the

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claims and indebtedness of the county against me, and to entitle me and my sureties to a release."

The answer further alleges that the board of supervisors of Oconto county then consisted of ten members, and that, at a meeting of the board which was attended by but seven of the members, action was taken upon the above proposition, and by a vote of five to two the board adopted the following resolution:

"*Resolved*, That the proposition in writing this day made by Richard L. Hall to this board, for the settlement of his liabilities and debts to the county of Oconto, be and the same is hereby accepted and ordered spread upon the records; and that when he shall comply with his said proposition, he shall from that time be fully released from all liabilities to the county of Oconto; and W. A. Ellis, H. M. Royce and W. W. De Lano are hereby appointed a committee to carry said proposition and this resolution into effect; and they, or a majority of them, are hereby empowered, in the place of this board, to release him, and to execute and deliver in the name and on behalf of Oconto county all requisite and proper instruments in writing in the premises."

The answer then alleges as follows: "That, in compliance with the proposition submitted in the foregoing petition by said Richard L. Hall, and in pursuance of the resolution aforesaid accepting said proposition, and in consideration that a compliance with said proposition by said Richard L. Hall would entitle him as treasurer, and his sureties as such, to a full and complete discharge from all indebtedness to said county on account of the defalcation aforesaid, and to a full release from all liabilities on account thereof, and not otherwise, the said Richard L. Hall entered upon the performance of said proposition and resolution; that, as a part of the performance of said proposition, and as a compliance therewith, and in the full faith that a compliance therewith on the part of said Richard L. Hall would ensure to said Hall and to his

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sureties perpetual release and discharge from all liabilities on account of the defalcation aforesaid, as in said petition claimed and demanded, and as a part of the consideration for said discharge, said Richard L. Hall executed the notes, and the defendant *Ben. R. Hall* executed the mortgage, as in the amended complaint alleged; that said notes and mortgage were approved by the committee in said resolution named as a part of the payment in said proposition offered; that the said Richard L. Hall did fully comply with the terms of said proposition and resolution, and the giving of the said mortgage by the defendant *Ben. R. Hall* was a part of the compliance therewith."

It is further alleged in the answer, that two of the members of the board of supervisors who were present and voted on the above resolution — William Ellis, who voted for its adoption, and William Brunquest, who voted against it, — were sureties in certain official bonds of Richard L. Hall as such treasurer; Ellis in the treasurer's drainage-fund bond of 1870, and Brunquest in the corresponding bonds of 1867 and 1869; during which years defalcations of the treasurer occurred in respect to those funds.

The plaintiff demurred to the answer of the defendant *Ben. R. Hall* on the ground that it failed to state a defense to the action, and appealed from an order overruling the demurrer.

W. H. Webster, for the appellant.

For the respondent, there was a brief by *Fairchild & Fairchild*, and oral argument by *H. O. Fairchild*.

LYON, J. When the cause was here on the former appeal, we thought the complaint alleged, in substance, that the mortgage of the defendant *Ben. R. Hall* was voluntarily given as additional security, *pro tanto*, for the defalcation of the defendant Richard L. Hall as county treasurer; and it was held competent for the board of supervisors to take such additional security. It was also held that the complaint contains no suf-

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ficient averments to raise the questions of the power of that board to compromise with the defaulting treasurer, and its power to release, in whole or in part, the right of action on his official bonds. 42 Wis., 59.

But the answer of the defendant *Ben. R. Hall* raises these questions, and also the question whether the resolution accepting the proposition of Richard L. Hall, and releasing him from all liability to the county on compliance with its terms, was adopted at a meeting of the board at which a legal quorum of the members attended and acted upon the resolution.

In the view we take of this case, we are not required to determine whether the county board of supervisors may compromise such a claim and accept less than the amount actually due in full discharge of the claim, or whether the board may discharge the treasurer and his sureties from liability upon the official bond of the former without a full compliance with the conditions of such bond; or, if the board has such power, what are the conditions and limitations (if any exist) upon its exercise. These are very important questions, and they are not free of difficulty. We prefer to leave them undetermined until a case shall arise requiring their determination. For the purposes of this appeal it will be assumed that the county board of supervisors is vested with those powers, without condition or limitation.

The answer alleges, in substance, that the mortgage in suit, and the notes of Richard L. Hall which such mortgage was given to secure, were executed pursuant to the proposition of the latter to the board of supervisors for a compromise of and discharge from his indebtedness to the county, and upon the sole consideration that Richard L., and the sureties in his official bonds, should be released and discharged from all liability on account of such defalcation. Under these averments, we suppose neither argument nor citation of authorities is necessary to show that if Richard L. Hall and his sureties have not been so released and discharged, the considera-

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ation for which the notes and mortgage were given has entirely failed, and that no action by or on behalf of the county can be maintained to enforce them.

These preliminary observations bring us to the consideration of the question, Was the meeting of the board of supervisors at which the resolution to accept the proposition of Richard L. Hall was adopted, composed of a lawful quorum of the members of the board? If it was not, its action in the premises is null and void, and Hall and his sureties are still liable on the official bonds of Hall for the amount of his defalcation.

The general rule of the common law is, that members of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent. The rule is founded on principles of natural justice and sound public policy. Perhaps the only recognized exception to this rule is the case where the body or board is permitted to fix the compensation of its members. This exception goes upon the necessity of the case, and the fact that all of the members are equally interested; and it has been well said that no principle can be derived from it. Cushing's Law and Practice of Legislative Assemblies, § 1839. The above rule has been recognized by this court, and the principle of it extended and applied to officers of corporations not municipal. In *Walworth County Bank v. F. L. & Trust Co.*, 16 Wis., 629, it was applied to an officer of a railroad company; and in *United Brethren Church v. Vandusen*, 37 Wis., 54, to the trustees of a church society. The principle was also applied to a school-district officer in *Pickett v. School District*, 25 Wis., 551.

In *Coles v. Trustees of Williamsburgh*, 10 Wend., 659, the same principle was applied to a village trustee. Mr. Justice NELSON said, in substance, that such trustee was disqualified

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by general principles of law to vote on a certain proposition before the board of trustees affecting his property.

Ellis and Brunquest, who voted on the resolution under consideration, were sureties in official bonds of Richard L. Hall, conditioned for the proper disbursement of the drainage funds in his hands during certain years. Hall converted to his own use portions of the funds in respect to which such bonds were given; and if he was liable to the county for such conversion, the resolution contemplated his release from liability therefor. Of course the release of Hall would operate to release his sureties.

That the county was primarily liable for the proper application of these funds, and that Richard L. Hall and his sureties were liable to the county on his special drainage-fund bonds for any misappropriation of the funds, we cannot doubt. The drainage fund is constantly referred to in the statutes relating to it as belonging to the counties. It is provided by law that the lands from the sale of which the fund is derived, shall be held by the land commissioners of the state in trust for the counties respectively entitled to the fund. Moreover, the special bond of the county treasurer for the proper disbursement of the fund ran to the chairman of the county board of supervisors. Laws of 1865, ch. 537; Laws of 1869, ch. 151; R. S., secs. 253-4. True, the fund was received by the treasurer in trust for the towns entitled to it; but that is quite immaterial. A large percentage of the money that finds its way into public treasuries is held in trust for some persons or corporations. School money for distribution to districts is so held. Yet no one doubts that if a county treasurer should embezzle such money, he and the sureties in his official bond would be liable to the county therefor in an action on such bond. The legal title to the funds (so to speak) is in the county, and that is sufficient to uphold an action on the bond by or on behalf of the county.

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We conclude that Ellis and Brunquest were severally liable to the county for portions of the money converted by Richard L. Hall to his own use, and were disqualified to vote on the resolution which aimed to release Hall from liability therefor, inasmuch as the release of Hall would release them. They were each liable to the county for a sum of money. The proposition before the board was to release them from such liability without full payment. Hence, they each had a direct pecuniary interest in the proposition, adverse to the county. They come within the rule above stated, and their votes on the resolution accepting the proposition are null and void.

When the resolution was adopted, the board of supervisors of Oconto county consisted of ten members, seven only of whom were present and voted on the resolution. Six members were required to constitute a quorum for the transaction of business. Without that number the board could do no valid act, except, perhaps, to compel the attendance of absentees or to adjourn.

Rejecting the votes of Ellis and Brunquest, but five members voted on the adoption of the resolution. No quorum voting, the vote is inoperative for any purpose. This is the rule of all deliberative bodies of which we have any knowledge. When a vote is taken and the result shows that no quorum has voted, the vote is not declared, and proceedings on the order of business are suspended until a quorum can be obtained; and it is quite immaterial that there is a quorum actually present, if no quorum votes. Hence, it does not aid the attempted action of the five members who voted, that Ellis and Brunquest were present.

We are compelled to hold, therefore, that the action by less than a quorum of the board upon the resolution is inoperative; that the resolution was not adopted; and that the liability of Richard L. Hall and his sureties on his official bonds is not released or affected by the attempted action of the board.

It follows that the facts stated in the answer show that there

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was no consideration for the mortgage in suit, and the notes which it was given to secure. This being a valid defense to the action, the demurrer to the answer was properly overruled.

By the Court. — Order affirmed.

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OCONTO COUNTY.

TAXES: COUNTY ORDERS. *How far county orders receivable for taxes.
Effect of such receipt as payment of the orders.*

1. Under section 72, ch. 18, R. S. 1858, as amended by sec. 1, ch. 124 of 1859, construed in connection with sec. 129, ch. 13, R. S. 1858, as amended by sec. 1, ch. 42 of 1859, a town treasurer is authorized to receive from any single tax-payer, in county orders, only a sum equal to the county taxes due from such tax-payer.
2. When county orders have been thus received by the town treasurer in payment of the county tax, they are paid, and cannot be held by the town as obligations of the county to it.
3. The statutory form of the town treasurer's warrant (sec. 91, ch. 18, R. S. 1858; sec. 33, ch. 130 of 1863; sec. 1081, R. S. 1878), and other provisions in former and present statutes relating to payments by town treasurers to county treasurers, by which preference is given to the town over the county in respect to moneys paid to the town treasurer for taxes (*Winchester v. Tozer*, 24 Wis., 312; *Wolff v. Stoddard*, 25 id., 503), are not in conflict with the provisions relating to county orders as above construed; but, if they were so, in terms, the special provisions relating to such orders must prevail over the more general provisions in apparent conflict with them.

APPEAL from the Circuit Court for Oconto County.

The defendant board appealed from a judgment in favor of the plaintiff town. The case will sufficiently appear from the opinion.

For the appellant, there was a brief by *R. W. Hubbell*, District Attorney, with *Tracy & Bailey*, of counsel, and oral argument by *Mr. Tracy*.

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For the respondent, there were briefs by *Fairchild & Fairchild*, and oral argument by *H. O. Fairchild*. They contended, 1. That the statute (Tay. Stats., 421, § 109) required the town treasurer to *retain* in his hands "the *amount specified in his warrant* to be paid into the town treasury," after paying the state tax in full; that the warrant in this case, following the statute (Tay. Stats., 410-11, § 67), commanded the town treasurer, *first*, to pay to the county treasurer the whole amount levied for state tax; *secondly*, to "retain and pay out as town treasurer, according to law," a specified sum, being the whole amount levied for town or inferior local purposes; and *thirdly*, to pay over "the *balance* of said money" to the county treasurer for county purposes; that the town treasurer, in the collection and return of taxes, was a ministerial officer, bound to obey the terms of his process strictly (*Stahl v. O'Malley*, 39 Wis., 328, and cases there cited); that, as a public officer charged by law with certain plain, positive duties, he was not therein subject to the direction of the town or of any other person (*Lorillard v. Town of Monroe*, 11 N. Y., 392; *Kellogg v. Sup'rs*, 42 Wis., 103); that, if he had collected only enough to pay the state tax and the town and local taxes, he was not at liberty to pay anything to the county treasurer for county purposes (*Winchester v. Tozer*, 24 Wis., 312; *Wolff v. Stoddard*, 25 id., 503; *Stahl v. O'Malley* and *Kellogg v. Sup'rs*, *supra*), and that neither in the sections above cited, nor in this warrant, nor elsewhere, was the town treasurer's duty to retain the amount expressed in the warrant limited to cases in which he had that amount in *money*, but it was made his absolute duty to retain that *amount*, if so much was left after paying over the state tax, and he was bound therefore to retain it if he had it in his hands in *any funds receivable for taxes generally*. 2. That sec. 72, ch. 18, R. S. 1858, as amended by ch. 124 of 1859 (Tay. Stats., 414, § 81), makes both town and county orders receivable generally for taxes, up to certain amounts, and does not declare that county orders shall be

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received for county taxes only; that there is nothing in its provisions inconsistent with those of the sections previously recited, or with the duty of the town treasurer as above defined; that under no possible circumstances could the town treasurer have any occasion, under the statute, to use town orders in settlement with the county treasurer; that the town is indeed not positively required by the terms of said sec. 72 to allow its treasurer any other orders than town orders on settlement of town taxes, but neither is it forbidden to make such an allowance; and that, after county orders have been received by the town treasurer, he may, if he chooses, at any time present them to the county treasurer for payment, though he has no occasion to do so in respect to those which he does not *retain for the town*, but pays over to the county treasurer. 3. That the command of the town treasurer's warrant, not only to retain but to "pay out" the specific sum named therein, must be construed as merely a command to *disburse*, or to hold for town purposes, and it cannot be said that the treasurer is not to retain county orders because he cannot pay them out. Under sec. 92, ch. 18, R. S. 1858 (Tay. Stats., 421, § 110), he can pay out nothing but cash funds. It might as well be argued from the terms of the warrant, that he cannot retain town orders because he cannot pay them out. Sec. 72, above cited, says nothing about paying out, but simply declares that he shall retain the amount specified in his warrant *to be paid into the town treasury*.

TAYLOR, J. This action was brought by the town of Marinette, respondent, to recover of the county of Oconto the value of certain county orders which were received by the treasurer of the town of Marinette in payment of taxes, and which were by him paid over to the county treasurer of said county, on his settlement with such treasurer, for the taxes collected by him in his town. The claim of the plaintiff is, that the treasurer of said town did not collect enough taxes,

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exclusive of such county orders, to pay the state tax and the whole of the town taxes, and that it was the duty of the town treasurer, therefore, to have held in his hands the county orders received by him in payment of taxes, to an amount sufficient, when added to the money and town orders collected and received by him, to make up the whole amount of the town and state taxes; that the county is not entitled to receive any of the county orders received in payment of taxes by the town treasurer, unless it appears that the town treasurer, before making his return of delinquent taxes, has in fact collected of the taxes upon the tax roll in his hands more than enough to pay the state and town taxes.

The solution of the question depends upon the construction which must be given to section 72, ch. 18, R. S. 1858, as amended by section 1, ch. 124, Laws of 1859, and section 129, ch. 13, R. S. 1858, as amended by section 1, ch. 42, Laws of 1859. The following are copies of said sections 72 and 129, as amended:

"Section 72. Town orders shall be payable for taxes in the town where issued, and shall be allowed the town treasurer on settlement of town taxes; and county orders and jurors' certificates shall be payable for taxes in the county where issued, and shall be allowed to such treasurer on his settlement of county taxes with the county treasurer; but no town treasurer shall receive town orders in payment for taxes to a larger amount than the town taxes included in his assessment roll, exclusive of all taxes for school purposes, nor county orders and jurors' certificates to a greater amount than the county tax included therein; and he shall, in all cases, pay to the county treasurer the full amount of state tax on or before the third Monday of January in each year."

"Section 129. County orders, properly attested, shall be entitled to a preference as to payment according to the order of time in which they may be presented to the county treasurer; but when two or more orders are presented at the same

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time, precedence shall be given to the order of the oldest date; but every county treasurer shall receive of town treasurers all county orders issued in such county, which such town treasurer may present in payment of county taxes, to the amount of the county taxes collected by any such town treasurer in his town in the year in which such orders are offered in payment; provided, no city or town treasurer shall be allowed to pay a larger amount in county orders than he has received in the collection of county taxes; said amount to be determined by the affidavit of the treasurer."

The learned counsel for the respective parties agree that under the provisions of said section 72 the town treasurer is only authorized to receive from each individual tax-payer in county orders, a sum equal to the county taxes charged upon the tax roll against such individual; and that it does not authorize him to receive generally, in payment of taxes, a sum in county orders equal to the whole amount of county taxes included in the whole tax roll.

The section thus construed (and we think no other construction can be properly given to it) authorizes the town treasurer to receive, and each tax-payer to pay, in county orders the amount of county taxes charged against him on the tax roll, and negatives the idea that such orders are receivable generally for taxes, and that the amount so receivable is only limited by the amount of county taxes charged upon the roll.

The statute is in itself most equitable. It says to the tax-payer who holds a claim against the county, which has been duly liquidated and audited by the proper authorities, and upon which he is entitled to demand payment of the county treasurer: "You may satisfy with such claim any demand which the county has against you for county taxes, provided you offer to do so before the town treasurer returns such tax as delinquent to the county treasurer." It permits a set-off of the order so held by the tax-payer against the county tax, and it necessarily follows that when the set-off is made as the law

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provides, both debts are satisfied; the county tax is paid and discharged by the county order, and the order is necessarily paid by the discharge of the county tax.

The learned counsel for the respondent admits that when the town treasurer receives a town order under the provisions of said section, in payment of a town tax, the order is paid and satisfied; but insists that the county order received under the same circumstances is not paid. We are unable to see why, if it is paid in the case of the town order, it is not in the case of the county order. In the case of the town order it is received by the treasurer on behalf of the town, and in the case of the county order it is, we think, equally clear that it is received on behalf of the county. The claim that the county order is not satisfied and paid when received by the town treasurer in discharge of a county tax, leads to this absurdity, that the claim of the county against the tax-payer is satisfied by the delivery of the county order to the town treasurer, and yet he may hold the same and again demand of the county payment for the amount thereof, notwithstanding the county has already paid it by discharging an equal amount of taxes due from the person who delivered it to the treasurer.

The only provisions anywhere in the statutes directing what shall be done with the county orders received by the town treasurers for county taxes are found in the two sections above quoted. The first section, after providing that the town treasurer shall receive them, says, they "shall be allowed to him on his settlement of county taxes with the county treasurer;" and the second section makes it the duty of the county treasurer to receive of town treasurers all county orders issued in such county, which such town treasurer may present in payment of county taxes; but he shall not receive more than the amount of county taxes collected by such town treasurer, nor more than he has in fact received in the collection of such taxes. These two sections make a special provision as to the collection of taxes in county orders, and they are independent of,

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and, as we think, entirely uncontrolled by, any other provisions of the law relative to the collection of taxes. These sections are complete in themselves; they define when a tax may be paid without the payment of money, and also what shall be done with the thing received in payment of the tax when so paid. These provisions amount to simply this: the county owes the tax-payer, and says to him, "Instead of paying what you owe the county for taxes in money, you may give credit for the amount on your claim against the county; the county will appoint the town treasurer to give a receipt for the tax and receive the evidence from you that he has credited the county for the amount on your claim; and the county, in settling with the treasurer, shall allow him the amount of these evidences of credit instead of money."

These sections, standing alone, are plain and unequivocal, and can admit of no other construction; but it is urged with great earnestness and ability that this plain construction of these sections must yield to the express direction in the town treasurer's warrant. Sec. 33, ch. 130, Laws of 1868, and section 91, ch. 18, R. S. 1858. The form of the warrant commands the treasurer that out of the moneys collected he must first pay to the county treasurer the amount of the state tax, and retain and pay out, according to law, as town treasurer, the amount of the town taxes, and the balance of the moneys he must pay to the county treasurer. Said section 91 requires the town treasurer "to retain in his hands the amount specified in his warrant to be paid into the town treasury, together with his fees, and on or before the day specified in his warrant for paying the money therein directed to be paid to the county treasurer, pay to him the sum so directed to be paid in the manner required by law; and in every case the town treasurer shall pay over the full amount of state tax, though it may occasion a deficiency in the town taxes." It is claimed, and the claim has been upheld by this court in *Winchester v. Tozer*, 24 Wis., 312, and *Wolff v. Stoddard*, 25 Wis., 503, that the

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town is to have the preference over the county; that of the moneys collected the town must be fully paid before the county can demand any payment by the town treasurer of the county taxes collected by him; and that, in case of any deficiency, the county must make itself good out of the delinquent taxes returned unpaid. This rule, as established in the cases above cited, has been declared by statute in the revision of 1878, and section 1114 provides that "all taxes returned as delinquent shall belong to the county, and be collected with the interest and charges thereon for its use, . . . but if such delinquent taxes, exclusive of the five per cent. collection fees, exceed the sum then due the county for unpaid county taxes, such excess, when collected (with the interest and charges thereon) shall be returned to the town treasurer for the use of the town."

It will be seen that these sections, as well as secs. 72 and 129, were all enacted together as a part of the same system for the collection of taxes, in the revision of 1849, secs. 52, 56, 68, 69, ch. 15, and sec. 110, ch. 10, and have been continued in force until the revision of 1878, and were then substantially re-enacted in that revision. See sections 1080, 1110, 1091, 715. If there is any conflict in the provisions of the statutes, such conflict was in the original system, devised in 1849, and has been perpetuated down to the present time.

It does not seem to us that there is any conflict in the provisions of the several sections. Section 33, ch. 130, Laws of 1868, which prescribes the form of the warrant (and which is but a reënactment of sec. 52, ch. 15, R. S. 1849, and sec. 61, ch. 18, R. S. 1858), and sec. 91, ch. 18, R. S. 1858, prescribe a general rule which shall govern and fix the rights of the towns and counties in the collection of taxes; and section 72, ch. 18, and section 129, ch. 13, R. S. 1858, were enacted for a specific purpose; and if such specific purpose be in conflict with the general rule, then such purpose must prevail over the general rule. It must be treated as an exception or modification of

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the general rule which is prescribed for the government of the respective officers of the town and county. The general provision must give way to the special provision. Strictly speaking, there is no conflict in the provisions. His warrant commands the town treasurer that out of the money collected he shall pay and retain, etc., not that he shall pay or retain out of the county orders received by him in payment of county taxes. The provision, therefore, that the county orders received shall be allowed him in his settlement with the county treasurer, does not conflict in the least with the command of his warrant; and as there is no provision specially authorizing the town treasurer to pay into the town treasury the county orders received by him, he must pay them over to the county treasurer as authorized by law. In addition to the absurdity of holding that a county order which the law declares the county shall receive in discharge of its county tax, shall, notwithstanding it has been so received, remain an outstanding and valid claim against the county, many other inconveniences might arise if the towns were authorized and required to retain the same for any balance which might be due the town for uncollected taxes. I suppose there can be no option. The town treasurer is either compelled to receive and retain them, or he is required to hand them over to the county treasurer in making his settlement. If the town must keep them, then the law requires that they must be taken in extinguishment of town taxes at their par value, no matter what their real value might be; and it might be that under the decisions of this court the town might be compelled to take county orders against which the statute of limitations had run, as this court has decided that such county orders must be received in payment of county taxes. *Pelton v. Supervisors*, 10 Wis., 69.

The question involved in this case is only of practical importance in a few of the towns in our northern counties, and in those we think the construction we have given the law as

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between the towns and counties will work much less harm than the one contended for by the learned counsel for the respondent. If the town treasurers do not collect money and town orders enough to pay the state and town taxes, the town will have a claim for the balance against the county when the same is collected under the provisions of section 1114; and if they cannot be collected by the county, there would seem to be no injustice in saying that the loss should fall equally upon the town and county, instead of upon the county alone.

The cases of *Winchester v. Tozer* and *Wolff v. Stoddard*, above cited, are not in conflict with this opinion, as the question discussed and involved in this case was not discussed or involved in either of them.

Having come to the conclusion that county orders received by a town treasurer in payment of county taxes, when so received, belong to the county and not to the town, and that the town treasurer cannot hold them for the use of the town, but must deliver them to the county treasurer in his settlement with such treasurer, it becomes unnecessary to consider the other questions which were discussed by the learned counsel for the respective parties in their briefs and at the bar.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to the circuit court to render judgment for the defendant.

WEBSTER VS. THE BOARD OF SUPERVISORS OF OCONTO COUNTY.

PRACTICE. (1) *What constitutes a trial.* (2) *Successive motions: Res Adjudicata.*

1. On appeal to the circuit court from the decision of a county board of supervisors rejecting plaintiff's claim for moneys paid for illegal taxes, where there were no formal pleadings, the judgment for plaintiff was based upon defendant's *stipulation*, admitting all the facts necessary to establish the claim, and a referee's *computation* of the amount paid, with interest. *Held*, that the record shows a *trial* of the issues, and not a mere judgment in default of an answer.

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2. After denial of a motion for a new trial, without leave, granted *at the same time*, to renew the motion, a second motion for the same relief, made *on substantially the same grounds*, without disclosure of any new facts, cannot properly be granted; the question being *res adjudicata*. *Rogers v. Hanig*, 46 Wis., 361.

APPEAL from the Circuit Court for *Oconto County*.

Plaintiff appealed from an order.

For the appellant, there was a brief by *Webster & Brazeau*, and oral argument by *Mr. Webster*.

For the respondent, there was a brief by *R. W. Hubbell*, its attorney, with *Tracy & Bailey*, of counsel, and oral argument by *Mr. Tracy*.

ORTON, J. This was an appeal from an order of the county board of supervisors disallowing the claim of the appellant for the reimbursement of illegal taxes. A judgment was rendered by the circuit court, April 12, 1878, for the appellant, upon a written stipulation signed by the district attorney, appearing for the county, admitting all the facts establishing the appellant's claim, leaving the computation of the amount and interest to be determined by a referee, which was accordingly reported by the referee to the court.

On the seventeenth day of the same month, the respondent, by the district attorney, obtained a rule against the appellant to show cause why the judgment should not be set aside, and the cause tried upon the issues therein.

This rule was founded upon the records, and the affidavit of the district attorney stating certain facts tending to show excusable neglect, mistake and surprise, and a defense by the statute of limitations; which facts tending to show mistake and surprise were denied by the affidavit of the appellant. This motion, after a full hearing, was denied, with costs, on the 23d day of April, 1878.

On the 10th day of May following, a second rule to show cause was obtained against the appellant, based substantially on the same grounds, and upon no newly discovered facts, for

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the purpose of setting aside the said judgment and having the cause tried upon issues *to be made*. This last rule having been heard upon the records and the affidavits of the district attorney and the appellant, an order was entered setting aside and vacating the judgment, with leave to the respondent to answer or demur within twenty days from the service of a copy of the order.

We think the second motion was substantially a renewal of the first, and without leave. In a recent case decided by this court, *Rogers v. Hanig*, 46 Wis., 361, in respect to a similar motion for a new trial, it was held "that a motion for the same purpose, and founded substantially upon the same grounds, had been denied, and the matter of such motion had become *res adjudicata*," and several cases in this court are referred to of the same effect.

In that case it was also held, "that the order of record is without qualification or reservation, and it must therefore be held to be conclusive until it has been modified in some proper way."

In that case it was sought to amend the record by a certificate of the circuit judge that such first order was intended to have been entered with leave therein to renew the motion, and that such qualification was omitted by mistake.

In this case it is contended that the second rule to show cause to the same effect as the first, operates as a qualification of the order denying the first motion, and constitutes sufficient leave of the court to renew it. We think the case referred to is decisive of the case upon this point.

The learned counsel of the respondent insists, with some plausibility, that as the claim filed by the appellant did not show the date of the various assignments of the tax certificates from the county, it did not appear that the statute of limitations had run upon the whole or any part of it, and that it was therefore verbally agreed between the district attorney

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and the appellant, outside of the written stipulation, that the dates of such assignments should be furnished to the district attorney before judgment; and that said dates had never yet been furnished to the district attorney.

It was denied in the affidavit of the appellant that he had ever so verbally agreed to furnish the district attorney with such dates; but it is admitted in such affidavit that it was agreed that such dates should be furnished the court before judgment, which was done, and the same filed with the papers in the case.

It seems that such dates appeared upon the report of the referee who computed the amount of such claim and interest. This report was part of the record which was before the court on the hearing of the first motion, and must be presumed to have been considered by the court in its decision, and therefore furnished no new ground for the second motion. A rule to show cause is, in effect, a motion, and is granted only to shorten the time of notice before the hearing (*Foot v. Carpenter*, 7 Wis., 395); and a rule to show cause could have no more effect as a leave of the court to renew a former rule, than a second motion.

As a rule of practice, it is well settled that leave to renew the motion after its decision must be granted, if at all, at the time of such decision, and be a part and qualification of the order on the first motion. *Corwith v. State Bank*, 11 Wis., 430, and cases cited in the opinion.

The learned counsel of the respondent contends further, that the order granting the last motion is not an order granting a new trial, but only setting aside a default and allowing an answer and trial on the merits, and therefore not appealable.

The point requires no further notice than to say that there had been a trial by the court upon the merits, and a finding of the facts was made by the court upon the stipulation admitting the facts without proof, and upon the report of a referee of the

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computation of the amount of the claim and interest; and this trial was had of the implied issues of such an appeal, of the claim asserted and denied, without formal pleadings.

The answer tendered with the last motion does not deny the facts admitted by the stipulation, and the only new defense is the statute of limitations now pleaded in form, which sufficiently appeared upon the record before the judgment was entered by the report of the referee of the dates of the various assignments of the certificates from which he computed the interest. We do not rule, however, that an appeal to this court will *not* lie from an order of the circuit court setting aside a default and granting leave to answer; for this question is not before us in this case.

By the Court. — The order of the circuit court is reversed, with costs.

COMSTOCK VS. LUDINGTON. (Two Cases.)*PLEADING: Complaint construed.*

In an action against a single defendant, by the grantee in a tax deed of a single tract of land, based upon a tax sale in 1869, a tabular statement annexed to and made a part of the complaint sets out the dates of the sales of said tract for taxes in 1871 and several following years, with the amount for which it was sold in each of said years, the dates of redemption, and the name of the owner at the time of each of said sales; but does not show any fact in regard to the sale of 1869. The complaint avers that said tabular statement shows "the names of the former owners of each separate tract or parcel of land, at the time of the sale of the lands aforesaid for said delinquent taxes, and the name of each and every person claiming under such former owners, so far as the plaintiff can ascertain the same;" and that "all the defendants herein whose names appear against each separate tract or parcel of land have or claim some interest in such separate tract of land, and that the said defendants are the only persons who claim any interest in said land adverse to that of the plaintiff." *Held*, that this is not equivalent to an averment that when the action was commenced defendant had or claimed an interest in the land, under the owner at the time of the tax sale; and that, in the absence of such an averment, the complaint does not state a cause of action against the defendant, under ch. 22 of 1859.

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APPEAL from the Circuit Court for Oconto County.

The defendant in each of these two cases appealed from a judgment in favor of the plaintiff, taken in default of an answer. The substance of the complaint in each case will sufficiently appear from the opinion.

The appeals were submitted for the appellant on the brief of *E. Mariner*.

W. H. Webster, for the respondent.

COLE, J. We quite agree with the counsel for the appellant that the complaint in neither of the above cases states a cause of action under the statute. The action in each case is brought upon a tax deed, under the provisions of ch. 22, Laws of 1859, for the purpose of barring the original owner, or the person claiming under him, of his rights in the tract of land described. The statute expressly requires the plaintiff in such an action to set forth in his complaint a description of the land the title to which is sought to be barred; to allege that he claims title to such land under a conveyance made by a clerk of a county board of supervisors, under the provisions of the act; and also to set forth a copy of the tax deed. The statute further requires the plaintiff to state in the complaint the name of the former owner or owners of each tract of land described therein, or the names of the persons claiming under such owner or owners, specifying the persons claiming each separate parcel thereof, and the amount of all taxes paid by him on the several tracts of land described in the complaint, which were assessed thereon subsequent to the tax for the nonpayment of which the same were sold, the time of payment, and the amount paid on each separate parcel. Section 37.

The action is one given by the statute, and it is insisted by the learned counsel for the appellant that the complaint should show with reasonable and sufficient certainty, without any guess or help by construction, that the plaintiff has a cause of action under it. And it is objected that the complaint in each

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case entirely fails to show that the defendant was the owner of the land at the time of the tax sale upon which the deed is founded, or that he has, or claims to have, any interest in the land derived from such former owner. We think this objection is well taken, and is fatal to the complaint. It surely does not admit of discussion, in view of the explicit language of the statute, that it was essential that these facts should be stated in the complaint. But it is said, in answer to the objection, that there is enough in the complaint, when taken in connection with the tabular statement which is annexed to and made a part of the complaint, to show that the defendant was the owner of the land at the time of sale, or had, or claimed to have, some interest therein when this suit was commenced. It is true, the complaint sets forth that the annexed tabular statement shows certain things, among which are these facts, namely: "The names of the former owners of each separate tract or parcel of land at the time of the sale of the lands aforesaid for said delinquent taxes, and the name of each and every person claiming under such former owners, so far as the plaintiff can ascertain the same; and that, as the plaintiff is informed and believes, all the defendants herein, whose names appear against each separate tract or parcel of land, have or claim some interest in such separate tract of land, and that the said defendants are the only persons who claim any interest in said land adverse to that of the plaintiff, other than as hereinafter stated." Now, upon referring to the tabular statement, we find it sets out the dates of the sales of the tract made in the years 1871, 1872, 1873, 1874, 1875, and the amount of each sale, the date of redemption, and the name of the owner at the time of such sale; but it does not show, nor does it profess to show, the name of the owner at the time of the sale in either 1869 or 1870, which were the sales upon which the tax deeds in suit were founded. The allegation in regard to the interest of the defendant in the tract of land to which the plaintiff is seeking to quiet title, is that, "as the plaintiff is informed and

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believes, all the defendants herein, whose names appear against each separate tract or parcel of land, have or claim some interest in such separate tract of land, and the said defendants are the only persons who claim any interest in said lands adverse to that of the plaintiff."

Now, as the defendant is the only person whose name appears against any tract of land, and the only tract against which it so appears is the one described in the complaint, it is said this amounts to an averment that the defendant had or claimed an interest in the land when the suit was commenced. But we do not think that it is equivalent to such an averment. It is a senseless and unintelligible allegation, when considered with reference to the other facts stated. Holding, therefore, the complaint in each case fatally defective, it follows that the judgment of the circuit court in each case must be reversed, and the cause remanded for further proceedings.

By the Court.— So ordered.

BOWEN vs. HASTINGS and others.RES ADJUDICATA. *Decision on appeal of one defendant.*

1. In an action against merely *joint* contractors, where only one appeals from a decision of the circuit court (as upon a demurrer to the complaint), the determination by the appellate court of a question necessarily involved in its judgment upon such appeal, and in respect to which the rights of all the defendants are the same, is binding upon them all in subsequent proceedings in the action.
2. The decision of this court on a former appeal by one of the defendants herein (*Bowen v. Van Nortwick, imp.*, 38 Wis., 279), as to the effect of a certain contract and assignment, not only followed as *res adjudicata*, but explained and approved.

APPEAL from the Circuit Court for *Outagamie* County.

This cause was before this court on the appeal of the defendant *Van Nortwick* from an order of the circuit court overruling his demurrer to the complaint, and is reported in 38

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Wis., 279. The complaint contains the contract between the parties upon which the action is founded, and the assignment thereof by the defendants to the Ames Wood Pulp Company, and is sufficiently stated in the report of the case on the former appeal. This court then gave a construction to such contract and assignment.

The defendants have all answered. The substance of their answers, so far as a statement thereof is here necessary, is that the defendants entered into the contract with the plaintiff, for the benefit of the Pulp Company to be thereafter organized, under a parol agreement that, when organized, the company should be subrogated to the rights and liabilities of the defendants, who should thereupon be discharged from all further liability on the contract. The separate answer of the defendant *Van Nortwick* alleges that the plaintiff, as a director of the Pulp Company, demanded that the defendants should assign the contract to the company, procured the assignment to be drawn, and stated to the defendants that its execution by them would fully discharge them from all liability on the contract.

The cause was tried before Moses Hooper, Esq., as referee, whose findings of fact and conclusions of law are as follows:

"1. I find that the parties made the various written contracts set up in the complaint and answer:

"2. That on May 14, 1873, the Ames Wood Pulp Co., by direction of defendants, delivered to plaintiff stock as per contract, to the amount of \$10,000.

"3. That plaintiff surrendered his stock in the Ames Wood Pulp Co. on January 15, 1874, as alleged by him.

"4. That when the assignment of the land contract was made from *Hastings*, *Van Nortwick* and *Rogers* to the Ames Wood Pulp Co., the assignors expected that they were relieved from their agreement contained in the contract with plaintiff.

"5. I find that the execution of such assignment was not procured by *Bowen*, except that he made some proper author-

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ity from *Hastings, Van Nortwick* and *Rogers* a condition precedent to his making a deed to the company.

"6. I find that the misconstruction of such assignment by the defendants was not caused by the fraud, or mismanagement, or fault of plaintiff, but that there was a mistake of law of defendants.

"7. I find that there was no parol agreement between the parties prior to, or at the time of, or subsequent to, the making of the assignment sued on by plaintiff, which should estop or exclude the plaintiff from enforcing the promise on which plaintiff's action is based.

"8. Neither Ames nor the Ames Wood Pulp Co. was a party to the parol agreement which preceded the making of the contract which plaintiff sues on.

"As conclusions of law I find:

"1. That the plaintiff became, by virtue of this contract with defendants, and the surrender of his stock January 15, 1874, entitled to have and recover on that day, from defendants, the sum of \$10,793.33.

"2. That such right is not defeated or invalidated by the fact that *Hastings, Van Nortwick* and *Rogers* understood that the assignment by them to the Ames Wood Pulp Co. of the contract sued on released them from their liability.

"3. That the plaintiff should have judgment against the defendants for the sum of \$10,793.33, with the interest thereon from the 15th day of January, 1874, besides the costs of this action."

The circuit court confirmed the report of the referee, and rendered judgment for the plaintiff in accordance therewith. All of the defendants appealed from the judgment.

For the appellants, there were separate briefs by *Collins & Pierce*, their attorneys, and *E. Mariner*, of counsel, and oral argument by *Mr. Collins* and *Mr. Mariner*.

Chas. W. Felker, for respondent.

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LYON, J. We think there is sufficient testimony in the case to support the referee's findings of fact. Hence such findings cannot be disturbed.

If the contract between the parties, and the assignment thereof to the Ames Wood Pulp Company by the defendants, receive the same construction on this appeal that was given them on the appeal of the defendant *Van Nortwick* (38 Wis., 279), it seems clear that the findings of fact fully sustain the referee's conclusions of law and the judgment rendered pursuant thereto. We are to determine, therefore, whether the contract and assignment must be construed on this appeal the same as on the former appeal.

That each question necessarily determined on that appeal is *res judicata* as to the defendant *Van Nortwick*, by whom the appeal was taken, is perfectly well settled here and elsewhere. *Du Pont v. Davis*, 35 Wis., 631, and cases cited; *Lathrop v. Knapp*, 37 Wis., 312; *Hutchinson v. Railway Co.*, 41 Wis., 541; *Van Valkenburgh v. Milwaukee*, 43 Wis., 574.

On that appeal it was held that the stipulation in the contract by the defendants, to pay the plaintiff a specified sum for the stock of the Pulp Company in case the plaintiff should surrender the same to them within two years, was an independent personal agreement of the defendants, and that the assignment contained nothing which discharged them from liability for its nonperformance. The contract and assignment were parts of the complaint, and it was necessary to determine their construction and effect in order to determine whether the complaint stated a cause of action. Hence, it seems clear that the defendant *Van Nortwick* is absolutely concluded by the decision and judgment of the court on his appeal, whether the court adjudged correctly or not, and that as to him the judgment of the circuit court must necessarily be affirmed.

But whether the defendants *Hastings* and *Rogers*, who were not parties to the first appeal, are also concluded by the determination of that appeal, is a more difficult question. We have

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seen no case corresponding with this in its facts; but there are adjudications the principle of which seems applicable to this question. It has frequently been decided that if the holder of a *joint* obligation sues one of the joint obligors alone and recovers, and afterwards sues another joint obligor on the same obligation, the latter may plead the judgment against his coobligor in bar of the action against him. This is doubtless the common-law rule. *Ward v. Johnson*, 13 Mass., 148; *King v. Hoare*, 13 Mees. & W., 494; *The People v. Harrison*, 82 Ill., 84; Broom's Legal Maxims, 248. These cases go upon the ground that the obligation is merged in or cancelled by the judgment against the obligor first sued, and that because the obligation is joint, and not several, it cannot be divided and stand merged or cancelled as to one, and operative as to another, joint obligor. This is but an application to those cases of the maxim *res judicata pro veritate accipitur*.

Our statutes relating to remedies against joint debtors impliedly recognize the rule of the above cases. Section 2884, R. S., provides that in an action against several persons jointly indebted upon a contract, the plaintiff may proceed against the defendant served, unless the court otherwise direct, and, if he recover judgment, it may be entered in form against all the defendants thus jointly indebted, so far only as it may be enforced against the joint property of all, and the separate property of the defendant served. Section 2795 gives a remedy in such cases by a proceeding in the nature of *scire facias* against the joint debtors not served with process, to require them to show cause why they should not be bound by the judgment in the same manner as if they had been originally summoned.

Had not the legislature supposed that the judgment against the joint debtor served with process would otherwise bar an action on the original contract against those not summoned, it seems to us that the above sections would not have been enacted. If the legislature thought that such a judgment

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does not bar an action on the contract against the joint debtors not served with process, it is fair to presume that the plaintiff would have been left to that remedy.

It would seem to result logically from the rule of the cases above cited, that if, in an action on a joint contract in which only one of the joint contractors is summoned, the defendant summoned should successfully defend against the contract, and the court should adjudge it invalid on grounds common to all of the joint contractors, a joint contractor afterwards sued on the same contract may, in like manner, plead such judgment in bar of the action against him.

In *Ward v. Johnson*, *supra*, it is said that "we know of no principle of law which can authorize us to give separate judgments in an action on a joint contract." And it was said by PARKE, B., in *King v. Hoare*, *supra*, that "an action on a joint debt, barred against one, is barred altogether; the only exception now being where one has pleaded matter of personal discharge, as bankruptcy and certificate." A release of one joint debtor under certain circumstances, pursuant to our statute, is within the above exception. R. S., 1018, sec. 4204.

It may be observed in this connection, that, while the statute gives process against a joint debtor not summoned, to bind him by a judgment against his codebtor who was summoned, we have no statute giving a remedy against the former, if the contract has been adjudged invalid on the defense of the latter on grounds common to both.

Bearing in mind that in any event judgment must go against the defendant *Van Nortwick*, we are asked to give, not only a separate judgment in respect to the same joint contract, but one in favor of the other joint contractors, when the three stand upon precisely the same ground, sustain the same relation to the contract, and make the same defense thereto. Two judgments on the same joint contract, so anomalous and contradictory—each stultifying the other,—cannot properly be rendered.

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This is a stronger case for the application of the doctrine of *res judicata* than those above cited. These joint contractors are all parties to the action, and *Hastings* and *Rogers* had their option to demur to the complaint with *Van Nortwick*, and with him might have taken the opinion of this court on the construction of the contract and assignment.

Our conclusion is, that the construction given to the contract and assignment on *Van Nortwick's* appeal is *res judicata* in the cause, and binds all of the defendants, they being joint contractors only. The foregoing views lead to the affirmance of the judgment.

The opinion on the former appeal only states the conclusions reached by Mr. Justice COLE and myself, the case having been decided by us in the absence of the chief justice. The brevity of the opinion—we fear a somewhat rare fault—is probably censurable. The misuse of the pronoun *its* for *their* in the second paragraph (to which counsel has kindly called our attention, and which the charitable reader will regard as a mere clerical error), we trust will mislead no one. Indeed, we think there should be no difficulty in understanding the opinion, as far as it goes. We did not there say, what perhaps should have been said, that we found no ambiguity in the instruments under consideration, and that we thought the plaintiff was bound by the contract to convey the water-power when he received the stock. The contract required the stock to be delivered to him in thirty days, and it was delivered to him within thirty days from the date of the contract. We were quite unable to perceive how the performance of his covenant to convey the water power, which he became absolutely bound to perform within a month after the contract was made, could defeat his right to surrender his stock to the defendants, which the contract provided he might do at any time within two years thereafter.

We have carefully reviewed the former decision, and are

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all agreed that it gives the proper construction to the contract and assignment.

By the Court.—The judgment of the circuit court is affirmed.

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NOVATION OF CONTRACT. (1) *When breach of original contract immaterial.* (2) *Estoppel against original obligor.*

PRACTICE. (3) *Continuance: Waiver of objection.*

REVERSAL OF JUDGMENT. (4) *No reversal for error not prejudicial to appellant.*

COSTS. (5-9) *Costs at the circuit and in supreme court: Presumptions from record.*

1. Where A. gave his notes for a large part of the price of chattels purchased by him, and a mortgage of the same chattels to secure the notes, and, upon A.'s default in payment, B., to prevent a seizure of the chattels by the vendors, agreed with them and A. to give the vendors, and did give them, as the nominal purchaser of the chattels, his own notes and a real estate mortgage for the amount remaining unpaid upon A.'s notes: *Held*, in a suit against B. upon his notes, that the original contract of purchase by A. was superseded by this arrangement, and the question whether there was a warranty in the sale to A., and damage to A. from breach thereof, was immaterial.
2. *It seems*, also, that the use of the property by A. for nearly a year without claim of damages for breach of the alleged warranty, and his assent to the computation of the balance due upon his notes, and the security given therefor, would estop any claim of such damages herein.
3. A compliance with the terms upon which a continuance is granted, and an acceptance of the benefit of the continuance, are a *waiver* of any objection to such terms.
4. In foreclosure of a mortgage, so much of the judgment as provides for selling first that part of the premises which was not included in the mortgagor's homestead, appearing to be for his benefit only, error in admitting evidence taken by plaintiff *ex parte* to show that a part of the premises was homestead, and that the remainder could be sold separately without injury, is not ground of reversal.
5. In the absence of evidence to the contrary, it must be presumed that motions for which costs were taxed were "ordinary motions," and an allowance therefor, in the taxation of costs, of a greater sum than that prescribed by statute (sec. 41, ch. 133, R. S. 1858), is error.

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6. No separate costs are allowed by the statute for copying *indorsements* of papers.
7. It must be presumed, in the absence of proof to the contrary, that an allowance by the circuit court for sheriff's fees for serving subpoenas was supported by the returns to subpoenas before the court.
8. An allowance for several days' attendance of witnesses who were *attorneys-at-law*, held not erroneous, where it does not appear that they were "counsel in the cause."
9. On affirming the judgment herein in other respects, but directing a deduction of about twelve dollars from the costs allowed, this court denies costs of this court to either party, but requires the appellant to pay the clerk's costs.

APPEAL from the Circuit Court for *Chippewa* County.

Action to foreclose a mortgage given by the defendant *Charles Johnson* to the plaintiffs to secure payment of his notes: one for \$600, due December 1, 1875; one for \$400, due December 1, 1876; one for \$200, due December 1, 1877. *Charles Johnson* answered that the notes and mortgage were given to secure such sum as might be due the plaintiffs from one John C. Johnson under an agreement for the sale to the latter by plaintiffs of a steam separator of a certain described construction and character; that the contract of sale contained a warranty of the machinery by the plaintiffs, of a certain character; that at the time the notes in suit were made, the sum actually due plaintiffs from John C. Johnson under said contract was only \$1,115, which plaintiffs well knew; that, by fraudulent representations on plaintiffs' part, defendant was induced to believe that the balance due was \$1,200, and gave the notes and mortgage in suit relying upon those representations; that said notes and mortgage were given and accepted subject to all the conditions and warranties of the original agreement between plaintiffs and John C. Johnson; that the separator did not correspond in fact to the warranty, by reason whereof John C. Johnson had suffered damages in excess of the value of the machine; and that at the date of the defendant's notes and mortgage nothing was due from John C. John-

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son to the plaintiffs for said machine; and that nothing was due them on defendant's notes and mortgage at the commencement of this action. Prayer, for judgment that the notes and mortgage be given up to be cancelled, and that the complaint be dismissed, etc.

Certain questions of fact were submitted to a jury, who found, in response thereto, that John C. Johnson made with the plaintiffs the agreement alleged in the answer; that plaintiffs, at the time of the sale of the said machine, "warranted the same to the said John C. Johnson;" that the machine did not correspond to the warranty; and that at the date of the notes and mortgage in suit John C. Johnson had been injured by the breach of warranty, in the sum of \$489. Afterwards "plaintiffs, *ex parte*, without any notice, put in evidence the affidavit" of one of their attorneys that a part of the premises in question constituted defendant's homestead, and that the remaining part could be sold separately without injury to the parties. The judge subsequently found as facts, among other things, that John C. Johnson was damaged in the sum of \$98.60 by breach of plaintiffs' warranty of the machine; that plaintiffs took the machine from John C. Johnson and sold it to *Charles Johnson* for \$1,200, "being the amount due from John C. Johnson, with expenses," and *Charles Johnson* in payment therefor gave them the notes and mortgage in suit; that said notes and mortgage were not given subject to any warranty made to John C. Johnson or to any agreement made with him; that a part of the mortgaged premises constituted defendant's homestead, and the remainder could be sold separately without injury to the parties; that certain specified amounts were due and to become due on the notes; and that there was also due on the mortgage \$50 for solicitor's fees. Judgment was rendered accordingly; from which *Charles Johnson* appealed.

The questions raised on the taxation of costs will sufficiently appear from the opinion.

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For the appellant, there was a brief by *Meggett & Teall*, his attorneys, and *J. S. Carr*, of counsel, and oral argument by *Mr. Meggett*.

For the respondents, there was a brief by *Wheeler & Marshall*, and oral argument by *Mr. Wheeler*.

ORTON, J. We think it sufficiently appears from the evidence, that in August, 1874, John C. Johnson purchased of respondents certain steam machinery, for the sum of \$1,709.20, paid a small part of it, and gave his notes for the balance, to become due in the months of November and December, 1874 and 1875, and in the months of January and November, 1876; and, to secure the same, executed to the respondents a chattel mortgage upon the whole or part of the machinery sold, and a mortgage upon certain real estate which he claimed to own. In the month of July, 1875, after the said John C. Johnson had made use of the machinery nearly a year, and had paid only a small part of the amount so secured, and was in default of payments past due, and the respondents had ascertained that the said Johnson had no title to the lands mortgaged, they threatened, and took some steps, to take the machinery upon the chattel mortgage, and on the ground that it had been obtained by false pretenses.

To prevent the respondents from so doing, it was arranged between the said John C. Johnson, his brother *Charles Johnson*, the appellant, and the respondents, in effect that the balance unpaid upon the notes so given by John C. Johnson should be computed and ascertained, and that the said *Charles Johnson*, the appellant, should give his notes and mortgage to the respondents therefor, as the nominal purchaser of the machinery, for such amount. This arrangement was carried into effect, by the computation of said amount at the sum of \$1,200, in the presence and with the knowledge and assent of John C. and *Charles Johnson* and the respondents, and such amount fully agreed upon; and by the said *Charles Johnson*,

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the appellant, giving to the respondents the notes and mortgage upon which this suit is brought.

In this view of the evidence, it is immaterial whether there was a warranty of the machinery in the first contract of purchase, or any damage to John C. Johnson from the breach thereof, or not; for that contract of purchase was wholly superseded, if not rescinded, by such subsequent arrangement between the parties. But, if it were important to inquire as to the existence or breach of any such warranty, or as to the damages resulting therefrom to John C. Johnson, in defense of this action, his use of the machinery for nearly a year, without claiming or insisting upon any such damages, and his assent to the computation of the balance due and the security given therefor, would be a full waiver and estoppel of such damages. *Smith v. Armstrong et al.*, 24 Wis., 446; *Webster v. Phoenix Ins. Co.*, 36 Wis., 67; *Gans v. St. Paul F. & M. Ins. Co.*, 43 Wis., 108; *Locke v. Williamson et al.*, 40 Wis., 377; *Morehouse et al. v. Comstock*, 42 Wis., 626.

The findings of fact by the circuit court appear to be sustained by a clear preponderance of the evidence, and the conclusions of law thereon are correct, and warrant the judgment, if the rulings upon other matters are not erroneous; and these we will briefly consider in their order:

1. The exception to that part of the order of continuance at a previous term, making the terms of such continuance the payment of forty dollars by the appellant as the expenses of obtaining the attendance of a witness outside of the state, must be held to have been waived by its payment, and by receiving the benefit of the continuance granted upon such terms. *Damp v. Town of Dane*, 33 Wis., 430.

2. The taking of *ex parte* evidence by the respondents in respect to a part of the mortgaged premises, being the homestead of the appellant, and as to the situation of the remainder, with the view to so frame the judgment as to have such remainder first sold, would seem to be favorable *only* to the

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appellant, by giving him the advantages of a homestead exemption; and the injury to him by such procedure is not perceived.

3. The allowance of the fifty dollars solicitor's fee named in the mortgage was not only lawful, but a proper exercise of judicial discretion. *Pierce v. Kneeland*, 16 Wis., 672.

4. The errors complained of in the taxation of the costs are mostly very indefinite, and by no means clear from the evidence furnished by the record.

The investigation and analysis of the items of a taxed bill of costs, with the *minutes* and technical knowledge of the subject so necessary and indispensable to make each item the subject of legal certainty and exact justice, impose upon this court a very difficult and vexatious duty in any case, and it is encouraging to know that such duty is not often imposed. We shall, however, endeavor to consider the several objections made with such care as their importance demands.

The item for arguing two motions, taxed at six dollars, was clearly erroneous. In the absence of any proof to the contrary, these motions must be presumed to have been such as are mentioned in section 41, ch. 133, R. S. 1858, as "ordinary motions," the taxable costs for which are sixty-two and a half cents each.

The items of drafting and copying eleven *indorsements* of papers, taxed at four dollars and sixty-seven cents, are not specifically allowed by any statute; and we are not inclined to *force* a construction of any statute to sanction such a petty exaction.

The item for an abstract, taxed at five dollars, was not shown by any proof to be a fair charge; but we think it was shown by the affidavit of the appellant to have been excessive, and that the proper charge therefor should have been only two dollars and forty-five cents.

The items of sheriff's fees for serving subpoenas were not shown by any proof to have been improper, and it must be

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presumed that the returns of the subpoenas were before the circuit court, showing the amount of such fees.

The costs for witness fees, as taxed, were proved by the affidavit of the attorney of the respondents, and were not shown to be improper by any counter-proof, or to have been included in any former bill of costs paid, and were correctly taxed as to all of the witnesses, unless the charges for several days' attendance of some of the witnesses, who were attorneys-at-law, were improper. The attorneys who were such witnesses were not shown to have been "counsel in the cause," and therefore they did not come within the exception of the statute; and the fact that they were in attendance upon the court in other business would not prevent them from receiving the fees of other witnesses, within the principle established in the case of *McHugh v. C. & N. W. Ry Co.*, 41 Wis., 79. The total excess of such taxed bill over the legal and proper costs is the sum of eleven dollars and ninety-seven cents (\$11.97), which should be deducted from the costs in the judgment.

By the Court.—The judgment of the circuit court is affirmed except as to the costs therein, and as to such costs it is reversed, with directions to modify the same by deducting therefrom the sum of eleven dollars and ninety-seven cents. Neither party will recover any costs in this court, but the appellant will pay the costs of the clerk.

THE UNION LUMBERING COMPANY vs. THE BOARD OF SUPERVISORS OF CHIPPEWA COUNTY and others.

PLEADING. (1) *What averments not deniable on information and belief.*

VACATING JUDGMENT. (2, 3) *On what grounds order refusing to vacate judgment will be reviewed, or reversed.*

1. In an action against a county board of supervisors to avoid taxes as illegal, defendants cannot deny on information and belief averments of facts appearing from the public records of the county and its towns: as, that the

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town assessors neglected to take, subscribe and annex to the assessment rolls, the prescribed oath; that the members of the board of equalization were not sworn before entering upon their duties, and did not make the affidavit required by law after performing their duties; that the certificates and statements required by statute were not made by the town clerk and secretary of the board of education (where the town system of school government had been adopted); and that the delinquent rolls of the towns were not properly authenticated.

2. On appeal from an order denying a motion to vacate a judgment on default, where the motion was based entirely upon a verified answer and affidavits to excuse the default, this court cannot consider any alleged irregularities in the proceedings before judgment.
3. An application to set aside a judgment, and for leave to answer, is largely addressed to the discretion of the court; and unless the applicant has excused his default, and tendered a verified answer showing a good defense on the merits, this court will not reverse an order denying the application.

APPEAL from the Circuit Court for *Chippewa* County.

For the appellants, there was a brief by *Wm. R. Hoyt*, their attorney, and *Arthur Gough*, of counsel, and oral argument by *Mr. Gough*.

For the respondent, there were briefs by *Wheeler & Marshall*, and oral argument by *Mr. Wheeler*.

COLE, J. This is an appeal from an order refusing to vacate a judgment which was entered herein on default. The action was brought for the purpose of having certain taxes, which had been assessed upon the lands described in the complaint, and certain tax certificates, declared illegal and void; and to restrain the county officers from taking any steps to collect such taxes, and from issuing tax deeds upon the certificates. On the hearing in this court, the learned counsel for the defendants entered into an extended argument for the purpose of showing that there was no substantial equity in the bill, and that the judgment should be reversed because of errors and irregularities in the proceedings in the circuit court. No irregularities, however, are specified or assigned in the motion to vacate the judgment, and, as we understand the case, the appli-

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cation was founded simply on the affidavits produced in support of the motion, which, it was claimed, excused the default, and upon a proposed answer. It is very obvious that we cannot on this appeal go into the merits of the case, nor consider the questions whether the court below had power to order a reference to take testimony as to the value of the lands, or whether the court committed an error in holding that the taxes assessed upon the lands described for the years 1875 and 1876 were illegal, and the certificates of sale issued for the taxes of those years void. This record presents none of these questions for consideration, and we shall therefore not pass upon them. We have only to consider whether the affidavits excuse the default of the defendants, and whether the proposed verified answer shows any defense.

Passing for the present the inquiry whether the default was sufficiently excused, we come to the question: Does the proposed answer disclose any defense? We think it does not. The complaint states certain facts, which, under the decisions of this court, undoubtedly invalidate the taxes assessed upon the lands in the towns of La Fayette, Siegel, Edson and Anson, for the years 1875 and 1876. Some of these facts or alleged irregularities were based upon the records of the towns and county. Such, for example, is the nature of the allegations, that the assessors of those towns failed or neglected to take, subscribe and annex to the assessment rolls the prescribed oath; that the persons composing the board of equalization were not sworn before entering upon their duties, and did not take the oath or affidavit required by law after performing their duties; that the school taxes were void, because the certificates and statements were not made by the town clerk and secretary of the board of education, where the township system of school government had been adopted, as the statute requires as the foundation of such school taxes; and that the delinquent rolls of the towns were not properly authenticated. As to these alleged irregularities, and others specified in the complaint,

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which affect the legality of the taxes, the defendants answer that they have no knowledge or information sufficient to form a belief. This answer is manifestly evasive and bad, because the public records within the reach of the defendants would enable them to positively and distinctly deny these defects in the tax proceedings if they did not exist. *Mills v. The Town of Jefferson*, 20 Wis., 50. This is really all the answer contains which professes to meet the case made by the complaint, and it is very evident that it shows no defense whatever; for the answer does not traverse and deny, nor confess and avoid, any of the material allegations of the complaint.

On the other point we are inclined to hold that the laches of the defendants is not excused; but we will not go into an examination of the affidavits bearing upon that question, for the reason that they are somewhat lengthy, and the fact that the answer tendered showed no defense is decisive of this appeal. The rule of practice is, that an application to set aside a judgment, and for leave to answer, is largely addressed to the discretion of the court to which it is made, and unless the default of the party is excused, and a verified answer tendered showing a defense on the merits, this court will not interfere with the refusal of the court denying the application. *Seymour v. Board of Supervisors*, 40 Wis., 62; *Levy v. Goldberg*, id., 308; *Howey v. Clifford*, 42 id., 562.

By the Court. — The order of the circuit court is affirmed.

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TAX TITLES: CONSTITUTIONAL LAW. (1) *When deposit must be made, in defending against tax title.* (2) *When assessor, as witness, may impeach assessment.*

1. Sec. 38, ch. 22 of 1859, and any similar provision in a city charter, requiring the original owner of land upon which a tax deed has been issued, to deposit in court the amount of the tax, etc., before he can defend an

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action to bar his right to the land, can be sustained as valid only by construing it to apply to defenses based upon mere *irregularities* in the tax proceedings, and not to those which go to the *groundwork* of the tax itself. *Philleo v. Hiles*, 42 Wis., 527, and other cases in this court.

2. The statutory provision (R. S., sec. 1063) disqualifying an assessor from impeaching by his testimony any affidavit made by him as such assessor, cannot apply where he has failed to make any affidavit; and his neglect to verify the assessment roll as required by law is itself fatal, and may be pleaded as a defense to the action above described, without deposit made.

APPEAL from the Circuit Court for *Chippewa* County.

The plaintiff, the grantee named in a tax deed, brought this action to foreclose the claim and interest of the defendants, (the original owners,) in the land described in such deed. The action was brought under section 35, ch. 22, Laws of 1859. The complaint is in the usual form, containing the averments required by the statute. The deed was executed in 1877, pursuant to a sale of the land in 1874 for the unpaid taxes of 1873. The land is situated in the city of Chippewa Falls.

The answer of the defendant alleges, and the uncontradicted evidence proves, that the assessment of all the property in the ward in which the land in question is situated, for the year 1873, was made on the basis of one-third the actual value of such property; and that the assessment roll of such ward for that year was not verified by the affidavit of the assessor.

No deposit was made with the clerk of the court, pursuant to section 38 of the act of 1859, at the time of filing the answer or at any other time.

The circuit judge directed a verdict for the defendant. The plaintiff moved the court to set the same aside, and grant a new trial, on the ground that the verdict was against law and evidence. This appeal is from an order denying that motion.

Arthur Gough, for appellant.

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For the respondent, there was a brief by *Bingham & Pierce*, and oral argument by *Mr. Bingham*.

LYON, J. The principal question presented by this appeal is: Was the deposit required by sec. 38, ch. 22, Laws of 1859, essential to the right of the defendant to interpose the defenses stated in the answer? The judgment of this court in *Philleo v. Hiles*, 42 Wis., 527, resolves this question in the negative. The facts of the two cases are very similar, and the cases are not distinguishable in principle. The defense proposed in *Philleo v. Hiles*, and the defense proved in this case, go to the very groundwork of the tax proceedings, not upon mere irregularity; and it is settled that to sustain such a defense no deposit is or can be required. Nothing can profitably be added to what is said on this subject by the chief justice in *Philleo v. Hiles*, *supra*; in *Marsh v. The Supervisors of Clark County*, 42 Wis., 502; and in *Plumer v. The Supervisors of Marathon County*, 46 Wis., 163. These cases, and others therein cited, demonstrate the invalidity of assessments made, as was the assessment under consideration, in willful disregard of the uniform rule of the constitution, and also of assessments not verified by the affidavit of the assessor as required by the statute.

It is claimed that the deposit is required by section 18, ch. 8 of the charter of the city of Chippewa Falls. Laws of 1873, ch. 169, p. 376. But it is clear that no provision of the charter can operate to require a deposit in a case like this. The section can be sustained as a valid enactment only as the validity of section 38 of the act of 1859 was upheld; that is, by restricting its operation to cases of mere irregularity. *Philleo v. Hiles*, *supra*.

It is assigned as error that the assessor who made the assessment in question, was allowed to testify on the trial that he assessed all the property described in the assessment roll at one-third its actual value. It is said that this is a violation of

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the statute, which provides that "no assessor shall be allowed in any court or place, by his oath or testimony, to contradict or impeach any affidavit or certificate made or signed by him as such assessor." Laws of 1878, ch. 384, sec. 12 (R. S., sec. 1063). We think otherwise. The assessor made no affidavit; hence his testimony did not impeach or contradict his affidavit. But, however this may be, the failure to verify the assessment roll as required by law is of itself fatal to the validity of the tax proceedings which resulted in the tax deed to the plaintiff.

We conclude that the record shows no sufficient reason for setting aside the verdict.

By the Court. — Order affirmed.

THE TOWN OF LA POINTE VS. THE TOWN OF ASHLAND.

PLEADING. (1, 2) *Complaint construed.*

DRAINAGE FUND. (3) *Validity of statutes for distribution of the fund.*
When officers estopped to deny their validity.

1. In an action by one town against another in the same county, to recover drainage moneys of the plaintiff town wrongfully received by defendant and appropriated to its own use, averments that all the swamp lands upon the sale of which said funds were received, were, at the time of such sale, situated in the plaintiff town, and none of them within the limits of the defendant town, followed by a general averment that the money belonged to the plaintiff, *construed* to mean that said lands were within the limits of the plaintiff town *as those limits existed at the commencement of the action*; where it appeared that when the lands were sold, the plaintiff town included the whole area of the county.
2. The want of any averment in the complaint that the county clerk made a distribution of the drainage moneys in the hands of the county treasurer, amongst the several towns of the county, as required by statute, *held*, on demurrer, to be cured by an averment that the county treasurer *duly* passed said moneys to the credit of the plaintiff town, and paid them to its treasurer.

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3. The laws of this state for the distribution of the "drainage fund" to the towns are *valid*; and if they were void as violating the trust upon which the swamp lands were granted by congress to the state, neither a town treasurer who received them as such treasurer for the use of his town, pursuant to those laws, nor any person to whom he unlawfully transferred them, could be heard to defend against liability to the town therefor, on the ground that such laws were invalid (*Bullwinkel v. Guttenberg*, 17 Wis., 583; *Cairns v. O'Bleness*, 40 id., 369); and an order of the county board directing such town treasurer to pay a part of said funds to another town would be void, and no protection to the treasurer or to the town receiving the money pursuant thereto.

APPEAL from the Circuit Court for *Ashland* County.

The case is thus stated by Mr. Justice TAYLOR:

This action was brought by the appellant town to recover of the respondent the sum of \$10,000 of drainage-fund money, which the appellant claims belonged to it, and which had been unlawfully received by and appropriated to the use of the respondent town.

The complaint contains the following allegations:

"1. That the respective parties are duly organized towns of the county of Ashland.

"2. That on the first day of August, 1872, the county treasurer of the county of Ashland received from the commissioners of school and university lands the sum of \$24,592, money known as the drainage fund; that such money was received by said commissioners from the sales of lands granted to this state by the act of congress entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September 28, 1850, and known as swamp and overflowed lands lying in said county of Ashland, made between the first day of June, 1871, and the first day of June, 1872; and that such money was paid over to said county treasurer in trust, to be rendered to the towns in which the lands lay from which the same was derived, pursuant to chapter 537, Laws of 1865, and chapter 151, Laws of 1869, and acts amendatory thereof.

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"3. That all the lands so sold, and for the sale of which the said sum of \$24,592 was received as aforesaid, were, at the time said sales were made, situated in the town of La Pointe, and none of said lands were within the limits of the town of Ashland."

The other allegations of the complaint show that the commissioners made out the statement of the lands sold in said county of Ashland within the year aforesaid, as required by law, and transmitted and filed the same with the county clerk of the said county of Ashland, and that said certificate shows that all the lands sold were situate in the limits of the town of La Pointe; and it is alleged generally that all the money belonged to said town. The complaint then alleges that one George A. Stahl was the county treasurer who received said money, and was at the same time the treasurer of said town of La Pointe; that it became and was his duty to pay the treasurer of the town of La Pointe the whole of said money; that, in the execution of his duty in that respect, he duly passed said moneys to the credit of the plaintiff, the town of La Pointe, and entered the same upon his books as such treasurer of the plaintiff, and paid the same in fact into the treasury of the plaintiff; and that said money came in fact into the actual possession and became the property of the plaintiff. The complaint then alleges that said Stahl, as treasurer of said county, as well as of the plaintiff, afterwards transferred and paid over to the town treasurer of the town of Ashland, out of said sum of \$24,592, the sum of \$10,000, and that such payment was made by and in pursuance of a resolution or order made by the county board of supervisors of Ashland county, on the third day of August, 1872; that said order was wholly void, and a gross usurpation of unauthorized power; that the town treasurer of said town of Ashland received said sum of \$10,000 into the town treasury of said town, and for the public uses of said town, and that the same was accepted by the town board of said town, and the inhabitants thereof, as a part

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of the public money of said town, and was afterwards paid out by said town treasurer upon orders drawn upon him by the board of supervisors of said town, for the public use; that the plaintiff presented a duly verified account for said sum of \$10,000 to the proper board of auditors of said town, to be audited, settled and allowed; and that said board disallowed the whole of said account, and no part of the same has ever been paid to the plaintiff. Judgment is demanded for the said sum of \$10,000, and interest thereon from the seventh day of October, 1872.

To this complaint the defendant town filed a general demurrer, alleging that it did not state facts sufficient to constitute a cause of action. The circuit court sustained the demurrer; and the plaintiff appealed from the order.

For the appellant, there was a brief by *Vilas & Bryant*, and oral argument by *W. F. Vilas*.

H. N. Setzer, for the respondent.

TAYLOR, J. 1. The first objection taken to the complaint in this court by the learned counsel for the respondent is, that it does not show that the money ever belonged to the town of La Pointe. The ground of this objection is, that when the lands were sold from which the money was derived, the town of La Pointe covered the whole area of the county of Ashland — the town of Ashland not having been formed or organized until after such sales had all been made, viz., the second of July, 1872; and that therefore the allegation in the complaint "that all the lands so sold were, at the time said sales were made, situate in said town of La Pointe, and none of such lands were within the limits of the town of Ashland," does not show that none of said lands were situate within the limits of the town of Ashland after the same was organized. The allegation that they were, when sold, within the limits of the town of La Pointe, might be strictly true at the time when they were sold, as at that time the town of La Pointe covered the whole county, and still

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they might be within the limits of the town of Ashland after the formation of such town.

We are inclined to hold that this criticism upon the meaning of this allegation is not well taken. We think the allegation must be construed as relating to the limits of the towns as they existed at the time of the commencement of the action, and that the proper construction is, that the lands were within the limits of the town of La Pointe as then bounded, and not within the limits of the town of Ashland as then bounded. The further allegation in the complaint, which alleges that the descriptions of all said lands in the certificate of the commissioners show them to be situated in the limits of the town of La Pointe, this plaintiff, removes any doubt or ambiguity in the previous allegation; as the latter allegation clearly means the town of La Pointe as bounded at the time of the commencement of the action.

The want of an allegation in the complaint that the county clerk of the county made a distribution of the said sum of \$24,592 amongst the several towns of the county, as required by section 11, ch. 537, Laws of 1865 (sec. 255, R. S. 1878), is cured, we think, by the general allegation that the county treasurer duly passed said moneys to the credit of the plaintiff town, and paid the same in fact into the treasury of said town, and that the money came into possession of said town. These allegations, connected with the other allegations showing conclusively that the plaintiff town was entitled to receive the whole money, show with sufficient clearness that the possession and title to said money were in the plaintiff at the time it is alleged to have been unlawfully paid over to and received by the defendant town.

There is no dispute between the parties to the action that, under the provisions of the laws of this state, the plaintiff town is entitled to the whole sum of \$24,592, if such sum was received from the sales of swamp and overflowed lands situate within the limits of said town as the same was bounded at the time

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the money was received by the county treasurer from the commissioners of the school and university lands; and, as we understand the allegations of the complaint, it sufficiently shows that such was the fact. Nor is it disputed that the defendant town is liable to the plaintiff for the said sum of \$10,000 received by it and appropriated by it to its public purposes, unless we shall hold that the whole law of this state regulating the distribution of the moneys derived from the sale of the swamp and overflowed lands is void.

2. It is insisted by the learned counsel for the respondent, that the laws of this state regulating the distribution of the moneys derived from the sale of swamp and overflowed lands are void, because they violate the provisions of the act of congress donating them to the state. If such laws were void for that reason, still we are of the opinion that the defendant could not avail himself of that fact as a defense to this action.

It seems to us quite clear that the treasurer of the plaintiff town could not, in an action against him for refusing to pay the money so received to the town or to his successor in office, have defended on the plea that the laws in pursuance of the provisions of which he received the money were void, because they violated the trust created by the act of congress. Having received the money under the provisions of the law, for the use of the town, he is estopped from setting up that the law is void. He must hold the money subject to the provisions of the law under which he received it, until he has been coerced by some higher and superior power to hold the same for some other purpose. Having received the money for the use of his town as a public officer, he cannot convert it to his own use and set the town at defiance on the plea that the law under which he received it was void, and that the town has therefore no right to the money. We think this question has been settled by this court in the cases of *Bullwinkel v. Guttenberg*, 17 Wis., 583, and *Cairns v. O'Bleness*, 40 Wis., 469.

In the first case it was held that the treasurer of the town

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must pay over to his successor in office all moneys collected by him as such treasurer, although they were in excess of the sums authorized by law to be collected by the town. This the court say was a matter between the town and the taxpayer, and not between the treasurer and the town. He, having received the money in his capacity as treasurer for the town, must account to the town for it.

In the case of *Cairns v. O'Bleness*, the treasurer of the town refused to pay over money collected by him as its treasurer; and one ground of defense was, that he had collected the money upon the tax roll without having any warrant directing him to collect the same. Upon this point the chief justice says: "It appears that the treasurer collected the tax without a warrant as required by the statute. But he collected it for the town, *virtute officii*; and, having done so, could not retain the money as his own upon the ground that his authority was imperfect. He might have declined to collect the tax without warrant; having collected it upon the tax roll, for the town, he could not be heard to claim that he collected it for himself." The same rule has been sustained to its full extent by the courts of Vermont and Maine. *Town of Lyndon v. Miller*, 36 Vt., 329; *Inhabitants of Trescott v. Moan*, 50 Maine, 347.

In the last case cited the court say: "But it is contended that the proceedings of the town were irregular, informal and illegal. This is manifestly true. It is not often that such a medley of irregularities is exhibited in the proceedings of our municipal corporations. But the question is, Are these irregularities of such a character as to exonerate the defendants from paying over money which they have collected by virtue of these proceedings from the citizens, and to which they have no title, equitable or legal? The authorities, as well as every moral principle, negative such a proposition." So, in the case at bar, had the action been against the town treasurer of the town of La Pointe to compel him to pay over this money to his successor, he, having received the same for the use of his

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town, by virtue of his office as town treasurer, would not be permitted to allege that the law under which he received it was void. Having received the money as the treasurer of the town, he must account to the town for it, unless he can show, as above stated, that he has been lawfully compelled, by some superior power or authority, to pay it over for some other lawful purpose.

We think the defendant town can have no better title to retain this money than the treasurer from whom it was received. The order of the county board, directing the payment of this money to the defendant town, was simply void, and conferred no authority on the treasurer of the plaintiff town to pay over the money, nor upon the defendant town to receive it. For the purposes of this demurrer, the defendant town must be held to have known, when it took and used the \$10,000, that it had no right to receive the same, and that the treasurer of the plaintiff had no right to pay the same over to it; and, having received the money and appropriated it to the public uses of the town, it must respond to the plaintiff.

But we do not think the laws of the state upon the subject of the distribution of the moneys derived from the sale of the swamp and overflowed lands are void because they violate the trust, if any there be, imposed upon the state by the act of congress granting the same to the state. That part of the act of congress which is supposed to limit the power of the state in the distribution of such funds, reads as follows: "That the proceeds of said lands, whether from sale or direct appropriation in kind, shall be applied exclusively, as far as necessary, to the purpose of reclaiming said lands by means of levees and drains aforesaid."

The power to decide what part of the proceeds of the sales of these lands, or of the lands themselves, it is necessary to appropriate for the purposes of their drainage and reclamation, must be vested in the legislature of the state, as there is no other authority in the state which can determine that ques-

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tion. This was intimated very strongly by this court in *State v. Hastings*, 11 Wis., 448, 453. The title to these swamp lands is vested in the state by virtue of the grant made by congress. The state has full power, therefore, to sell and transfer the lands, and no trust fastens upon or follows the lands. The trust imposed by the act is a personal one, and is obligatory only upon the state.

The supreme court of the United States say, in regard to the trust created upon the donation of lands to the state for the support of schools: "The trusts created by these compacts relate to a subject, certainly of universal interest, but of municipal concern, over which the power of the state is plenary and exclusive. In the present instance the grant is to the state directly, without limitation of its power, though there is a sacred obligation imposed on the public faith." *Cooper v. Roberts*, 18 How., 173, 182. In *Dunklin County v. The District County Court of Dunklin County*, 23 Mo., 449, the supreme court of Missouri held that the trust created by the act of congress granting the swamp lands to the state was a personal trust reposed in the public faith of the state, and not a property trust fastened upon the land.

In *Barrett v. Brooks*, 21 Iowa, 144, the supreme court of the state of Iowa held: *first*, that under said act of congress the fee-simple title to the swamp lands passed to the state, and the legislature might dispose of the same; and *second*, that the United States is the only party which can enforce the trust coupled with said grant, to apply the funds arising from the sale of such lands "exclusively, as far as necessary, to the purpose of reclaiming the lands." It cannot be enforced on the application of a private citizen. In this last case the supervisors of the county, under the authority of a law of the state, appropriated \$7,000 of the swamp-land fund to aid in the building of bridges in the county. A citizen undertook to restrain such appropriation, on the ground that it was a diversion of the fund from the purposes contemplated by the act of

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congress. Judge DILLON, who delivered the opinion of the court, says: "The United States is the donor. Admit that the state or the county holds the lands charged with a trust to apply the proceeds, as far as necessary, to the reclamation of said lands: who can enforce this trust? The United States might. But it seems to us that it would never do to allow a single citizen to allege that certain drainage is necessary in his neighborhood, or in the county, and permit him to maintain a bill to settle this as a judicial question. The court will then be obliged to receive testimony touching the question whether all necessary drains and levees in the county have been constructed for the reclamation of swamp and overflowed lands. The United States, in this grant, deals with the states, and not with counties or individuals. If the United States is satisfied with the disposition which the state has made, or authorized to be made, of these lands, individual citizens must remain content." The same doctrine is, in substance, held by the supreme court of the United States in *Schulenberg v. Harriman*, 21 Wall., 44.

In *Supervisors v. State's Attorney*, 31 Ill., 68, 78, 79, the supreme court of the state of Illinois hold that the grant of the swamp lands to the states was absolute, and that the act did not even impose a trust upon the state to apply the proceeds of the same to their reclamation; and that the state had the power and right to dispose of such proceeds for any purpose which the legislature should determine was for the interest of the state. And in the same case the court holds that if a trust was imposed by the act of congress, there was no way to enforce it unless the United States should interfere. The same doctrine was reiterated in *Newell v. Supervisors*, 37 Ill., 253.

These authorities fully support the position that the legislature have full power to dispose of the proceeds of the sales of swamp lands, at least as against everybody except the United States; and that no person or corporation can be per-

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mitted to avoid any responsibility which has been assumed under the laws of the state in regard to the proceeds of the sales of these lands, on the ground that such proceeds are appropriated to a use which is not authorized by the grant of congress, or which is in violation of the trust imposed upon the state by such act.

By the Court.—The order of the circuit court is reversed, and the cause remanded for further proceedings according to law.

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REVERSAL OF JUDGMENT. (1) *No reversal for irregularity in the order of evidence.* (5) *Nor for defect in instructions, not prejudicial to appellant.*

(6) *Nor for repeating instructions to jury, on their return into court.*

PARTNERSHIP. (3) *Chattel mortgage, of firm property, by one partner.*

(4) *Effect of prior dissolution: What notice required.*

REPLEVIN: VERDICT. (7) *When value of plaintiff's special interest need not be found.*

1. Error in admitting an instrument in evidence without proof of its execution, is cured by subsequent proof of such execution, admitted without objection.
2. Possession of a negotiable note is *prima facie* evidence of ownership; and the transfer of a note secured by mortgage carries with it the security, without formal assignment.
3. One partner may execute a chattel mortgage of the firm property to secure a partnership debt, without the consent of his copartner; and his attaching a seal to the instrument, being unnecessary, will not affect its validity.
4. Where, on the dissolution of the firm of A. & B., A. became owner of certain chattels formerly belonging to the firm, a subsequent mortgage of such chattels in the firm name by B. would convey no title, if, prior thereto, the mortgagee had *personal* notice of the dissolution, or due *public* notice thereof had been given.
5. The instructions given herein, taken together, containing a full and correct expression of the law as above stated, and any defect in single instructions not being such as could have misled the jury to the appellant's prejudice, such defect is not ground of reversal.

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6. It is not error for the court, upon the coming in of the jury for that purpose, to read its instructions to them a second time, in order to satisfy one or all of the jury as to the true state of the law upon the issues before them.
7. In replevin, where plaintiff, claiming as mortgagee, has acquired and retains possession by giving the statutory bond, a verdict in his favor, finding him entitled to the possession, need not determine the value of his special interest. *Warner v. Hunt*, 30 Wis., 200, and earlier cases in this court, distinguished.

APPEAL from the Circuit Court for *Chippewa* County.

Replevin, commenced in February, 1878, by *Charles E.* and *Adelbert N. Woodruff* for horses, the possession of which plaintiffs claim by virtue of a chattel mortgage executed to James H. Woodruff, by Woodruff & Grist, to secure the note of that firm for \$232, dated November 3, 1877, payable December 23, 1877. Plaintiffs were sons of James H. Woodruff. Another Charles E. Woodruff, brother of James H. Woodruff, testified that in November, 1877, he was one of the firm of Woodruff & Grist, and as such executed the note and mortgage in question to secure a debt of that firm. Defendant claimed to own the horses by purchase from Grist in December, 1877. Grist testified for the defendant, among other things, that the partnership between him and Woodruff was dissolved in 1876, and that the note and mortgage were executed without his knowledge.

It was admitted that plaintiffs had duly acquired possession of the property from the officer, and retained the same. The other evidence need not be stated.

One of the instructions given by the court is recited in the opinion. The court further instructed the jury that if the partnership had not been dissolved, and the horses were the property of the firm, either partner could mortgage them in the name of the firm to secure a *bona fide* firm debt; that if the firm did not owe the debt for which the note and mortgage were given, those instruments were void; that a former partner neglecting to give public notice of a dissolution of the

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partnership, is liable to one who contracts with his copartner upon the credit of the firm, and who has no notice of the dissolution; and that if, at the time of the making of the note and mortgage in question, the firm of Woodruff & Grist were legally indebted to the mortgagee to the amount of the note; if the partnership had been previously dissolved, but it had been agreed at the time of such dissolution that Grist was to have all the personal property and pay all the debts of the firm; if the mortgage was on file in the proper office at the time of the sale of the horses to defendant; and if the mortgagee and the plaintiffs had no notice of the dissolution of the copartnership or of the assignment of the property to Grist — then they must find for the plaintiffs.

There was a verdict for the plaintiffs, that they were entitled to the possession of the property, the value of which was assessed at \$300; and nominal damages were also assessed in their favor. The judgment was that plaintiffs retain possession of the property, and recover the nominal damages, with costs. From this judgment the defendant appealed.

For the appellant, there was a brief by *Jenkins & Boland*, and oral argument by *Mr. Jenkins*.

For the respondent, there was a brief by *H. Richardson*, and oral argument by *J. M. Bingham*.

ORTON, J. The first error complained of, that the note and mortgage, the foundation of the plaintiffs' title, were received in evidence without proof of their execution — if error it was, which we do not decide, — was cured by the testimony of Charles E. Woodruff, taken immediately thereafter, and received without objection, in proof of their execution. *Zimmerman v. Fairbank*, 35 Wis., 368; *McPherson v. Rockwell*, 37 Wis., 159.

The objection that the assignment of the mortgage to and the ownership of the note and mortgage by the respondents were not proved, cannot be very intelligently considered, on

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account of the absence of the note and any copy of it from the evidence and papers in this court. It is conceded that there was no formal assignment of the mortgage, although it was proved that the respondents had purchased the note and mortgage from James H. Woodruff, the mortgagee, for value; and their transfer, therefore, depends upon the negotiability of the note. It was, however, claimed and insisted by the counsel of the respondents, upon the argument, that it was negotiable, and this fact was either admitted or not denied by the counsel of the appellant; so that it will be assumed that it was, and this disposes of the objection; for the possession and production of the note, so negotiable, by the respondents, were *prima facie* or presumptive evidence of its ownership by them (Story on Prom. Notes, § 381), and the transfer of the note carried with it the mortgage security. *Croft v. Bunster*, 9 Wis., 503; *Rice v. Cribb*, 12 Wis., 179.

The point made that Charles E. Woodruff, one of the copartnership of Woodruff & Grist, could not so execute the chattel mortgage, even to secure a partnership debt, without the consent of his copartner, is not well taken. The authorities upon the direct question here presented are nearly if not quite uniform in favor of such right. Herman on Chattel Mortgages, § 118, and cases cited in note 4; *Milton v. Mosher*, 7 Met., 244; *Purviance v. Sutherland*, 2 Ohio St., 478; *Sweetzer v. Mead*, 5 Mich., 107. And these last named authorities are also clear and to the point that the attachment of a seal to the chattel mortgage would not affect such right, because unnecessary to such an instrument. It was claimed upon the trial that, before the note and mortgage were executed, the firm of Woodruff & Grist had dissolved, and all the personal property of the concern, including the horses in dispute, became the individual property of Grist, who sold the horses to the appellant; and it was shown that the mortgage was duly filed in the town clerk's office long before such sale. It was therefore an important question, whether any public notice or *per-*

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sonal notice of such dissolution had been given before the execution of the mortgage, so as to charge the mortgagee, James H. Woodruff.

The court below charged the jury, in respect to this question: "If the evidence in this case satisfies you that the co-partnership between Woodruff and Grist has ceased to exist by mutual consent of the members thereof; *that the public had received notice of such dissolution*; and that a part of the conditions of such dissolution was that the horses in question had been assigned, sold and delivered to the defendant as his property — then the partner Woodruff had no right to encumber the same by chattel mortgage." The learned judge probably intended by *defendant*, the partner Grist, the vendor of the property. Exception is taken to that part of the instruction in italics.

This instruction, if objectionable at all, must be so because of its being too favorable to the appellant; for the jury are instructed to find for the defendant, if they find the facts mentioned, and that a *public* notice of the dissolution had been given, whether *personal* notice of such dissolution was given to the mortgagee or not, before taking the mortgage.

But, favorable or unfavorable to the appellant, his learned counsel contends that it was erroneous because it did not express the whole law upon the subject of such notice, and include both *public* and *personal* notice. This objection is fully met by other parts of the charge, which give protection to the mortgagee only if he had no notice whatever, either public or personal, of the dissolution; as in the language of the third instruction, "neglecting to give public notice," and "who has no notice;" and of the fourth instruction, "and the plaintiff herein had no notice of the dissolution." The instructions, taken together, contain a full and correct expression of the law upon the subject.

The jury coming into court and asking that the charge of the court be again read to them (whether for the purpose

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of instruction upon the law to one or all of them), which is complained of here as error, is a practice not only common, but approved by all authorities.

The only remaining question to be disposed of is, whether the verdict is incomplete and insufficient in not finding the mortgage interest, and the value of the special property of the respondents in the property taken by the writ. The respondents have possession of the property, having given the bond required by the statute, and recovered upon all the issues, and of course there was no return of the property awarded. The doctrine established by this court, in analogy to the practice in a justice's court in this form of action, is, that when a return of the property may be awarded as an alternative with judgment for its value, then, and then only, the interest of the successful party should be ascertained, in fixing the value of his special property which is to be the limit of such judgment. *Booth v. Ableman*, 20 Wis., 21; *Battis v. Hamlin*, 22 Wis., 669; and *Warner v. Hunt*, 30 Wis., 200. This practice cannot be extended to a case like this, where the plaintiffs were entitled to the possession of the property under the chattel mortgage, to be disposed of by them according to the terms of the mortgage, and according to law, to satisfy the mortgage debt, or the part thereof remaining unpaid, whatever it may be.

By the Court.—The judgment of the circuit court is affirmed, with costs.

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HALL VS. THE CITY OF CHIPPEWA FALLS.

CITY CHARTER: *Assessments for street improvements. (1) Steps required to charge adjoining lots. (2) Liability of city.*

1. A city charter provides that every resolution introduced into the common council for grading and graveling a street at the expense of adjoining lots, shall be referred to a committee, and shall not be adopted within fourteen days after its introduction, nor within ten days after the proceedings relative thereto at the time of its introduction have been published in the official paper; and that when the council determine to make such an improvement, they shall cause to be made and filed with the city clerk certain estimates, before the work is ordered. *Held*, that compliance with each of these requirements is a condition precedent to the liability of adjoining lots for such work.
2. Where work of the kind above described was ordered and contracted to be done at the expense of adjoining lots, without taking the necessary steps to charge the lots: *Held*, that the contractor cannot recover from the city, under a charter which declares that "in no event, when work is ordered to be done at the expense of any lot, shall the city be held responsible on account thereof."

APPEAL from the Circuit Court for *Chippewa* County.

Action for work done by plaintiff under contract with the defendant city, in grading, claying and graveling a street in said city. The complaint alleges, among other things, that the contract between plaintiff and the city (which is not set out in full) was entered into in August, 1874; and that in November, 1874, certificates of said work were issued to plaintiff, which are set out at length, and recite the making of said contract under authority of ch. 169 of 1873, the approval and acceptance of the work by the mayor, street committee and city surveyor, its value, and the fact that it was chargeable to and a lien upon certain lots in said city. The complaint then further alleges, that no part of said sum has been paid; that the whole amount thereof, with interest from November 28, 1874, is due plaintiff from said city; and that the certificates are void, and not a lien upon the lots therein, for the following reasons:

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(1) Because there has never been any land in said city corresponding to the descriptions in said certificates. (2) Because the resolution providing for the work done by plaintiff was passed on the day of its introduction by an affirmative vote of less than two-thirds of the members of the common council, and before the proceedings of the council relative thereto had been published in the official papers of said city, and were never referred to any committee, and no estimate was made of the expense thereof or of the amount to be assessed on the lots abutting on said street, or of the number of cubic yards to be filled or excavated, etc., prior to the time when said grading was ordered to be done, nor was any such estimate filed with the city clerk. (3) Because "no ordinance, resolution, order, by-law or proceeding was ever passed or adopted, or contract let, made or awarded" for such work "at the expense in whole or in part of the lots or any of them abutting or fronting on said street." (4) Because "none of the laws or ordinances, regulations, resolutions or by-laws" providing for said work was passed by an affirmative vote by a majority of the common council, or signed by the mayor, or duly published. (5) Because no notice of the time or place for receiving bids for such work was ever published in any official paper of said city. It is further alleged that before the commencement of the action payment of the amount was demanded of and refused by the city, plaintiff accompanying such demand with an offer to surrender the certificates; that the common council of said city has persistently refused to have the amounts of said certificates assessed upon the lands described therein, and plaintiff has thus been prevented from collecting the same; and that, until after full performance of the contract on his part, plaintiff had no knowledge of the several failures of duty on the part of the city officers, which rendered the certificates invalid.

A demurrer to the complaint as not stating a cause of action, was overruled, and defendant appealed from the order.

C. J. Wiltsie, for the appellant, contended, 1. That defend-

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ant's charter (Laws of 1873, ch. 169, subch. I, sec. 1) confers upon it in general terms the power to make contracts; that this authorized the city to make all such contracts as were necessary to effect the purposes for which the municipality was created (*Hodges v. Buffalo*, 2 Denio, 112; Dillon on M. C., 2d ed., § 648); and that one of these purposes was to put and keep the streets in a proper condition for travel, as appears by subd. 28, sec. 3, subch. V of the same act, which authorizes the common council "to lay out, make, open, keep in repair . . . any highways, streets, lanes and alleys," etc. 2. That the provision of the charter which declares that, "in no event, where work is ordered to be done at the expense of any lot or parcel of land, shall the city be held responsible," has no application to the issue made on this demurrer, because the complaint expressly negatives the idea that the work in this case was ordered to be done at the expense of any lot or parcel of land abutting or fronting on the street on which such work was done. 3. That the provision just cited is invalid, as an attempt to relieve a particular corporation from its liability under the general rule of law, in consequence of the negligent, fraudulent or otherwise unlawful acts of its officers or agents. *Durkee v. Janesville*, 28 Wis., 464; *Hincks v. Milwaukee*, 46 id., 559.

For the respondent, there was a brief by *Jenkins & Boland*, and oral argument by *Mr. Jenkins*.

COLE, J. According to the allegations of the complaint, it is very certain that the common council never took the steps prescribed by the city charter, which were essential to make the expense of grading, claying and graveling West street chargeable on the adjoining lots. The charter provides that every resolution for doing such work at the expense of the lots, on being introduced, shall be referred to some appropriate committee, and shall not be adopted sooner than fourteen days from the introduction thereof, nor until ten days after the pro-

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ceedings of the council relative thereto, at the meeting at which such resolution was introduced, shall have been published in the official paper. Section 1, sub-chap. XI of chap. 169, Laws of 1873. Again, the charter requires that whenever the common council determines to make an improvement of that character, they shall cause to be made an estimate of the whole expense thereof, and the amount to be assessed and charged to each lot, and the number of cubic yards to be filled or excavated in front of each lot; and such estimate must be filed in the office of the city clerk for the inspection of the parties interested, before the work is ordered to be done. Section 9, ch. XI. It was necessary that the common council should comply with these requirements of the charter in order to charge the lots with the expense of the work. This court has often decided that the taking of each step as prescribed was essential, and amounted to a condition precedent to making the lot liable. See *Massing v. Ames, Treasurer, etc.*, 37 Wis., 645, and cases cited in the opinion; also, *Pound v. Supervisors of Chippewa County*, 43 Wis., 63.

The complaint avers and shows that these and other provisions of the charter were not complied with on the part of the common council; and it follows, of course, that the adjoining lots were not chargeable with the work. And because of this failure of the common council to make the lots chargeable, it is insisted that the city is under obligation to pay for it. The difficulty, however, with this position is, that there is a further clause of the charter which declares that whenever any work has been done under a contract of the character of that mentioned in the complaint, the contractor shall be entitled to certain certificates, etc., but that "in no event, where work is ordered to be done at the expense of any lot or parcel of land, shall the city be held responsible for or on account thereof, or for any proceedings for the collection of the pay thereof." Section 12, ch. XI. It is impossible to hold, in the face of this provision, that the city is liable to pay for the improvement

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on the facts stated. See *Eilert v. City of Oshkosh*, 14 Wis., 587; *Whalen v. City of La Crosse*, 16 Wis., 270; *Finney v. City of Oshkosh*, 18 Wis., 210; *Fletcher v. City of Oshkosh*, id., 229; *Second Case*, id., 233. The case of *Fletcher v. City of Oshkosh* is a direct authority on the point we are considering. The charter of the city of Oshkosh contains precisely the same provision on this subject as the one in the charter of the defendant city. The holder of a street commissioner's certificate for work done upon the street there sought to charge the city, after a reasonable time had elapsed for collecting the assessment out of the lots, with the payment of the work. Mr. Justice PAINE, in delivering the opinion of the court, says: "We know of no rule of construction, and certainly the counsel cited no case, that could justify a court in thus overriding a plain provision of law. Whoever contracts for this kind of work, or deals in these certificates under such a charter, takes the risk of collecting his money in the manner provided, with a right to resort to the appropriate remedy to compel the officers to whom it is entrusted to discharge their duties; and he cannot come into a court and ask to hold the city liable, in the teeth of a provision which informed him at the outset that the city should in no event be liable."

These remarks are deemed sufficient to dispose of the question as to any general liability of the city to pay for the work. It must be presumed that the plaintiff contracted with the city with full knowledge of this provision in its charter, which exonerated it from all obligation to pay for such improvements. But it is said that the case made by the complaint does not fall within the provision, for the reason that the work was not ordered to be done at the expense of the adjoining lots. But all the allegations, especially the certificates set out in the complaint, negative this position, and show that the common council attempted to charge the adjoining lots with the expense of the work. Indeed, we find no provision in the charter which authorizes the city to make such improvements

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except at the expense of lot-owners. Whether the city, in the absence of this provision, would be liable for the work, is a question we need not consider.

In *Allen v. The City of Janesville*, 35 Wis., 403, the city had power under its charter to contract for the improvement of streets at the general expense of the city, and there was no provision exempting it from liability on that ground. In that case it was held liable as a matter of course.

It is objected that the provision exempting the city from liability is invalid, within the doctrine laid down in *Durkee v. The City of Janesville*, 28 Wis., 464, and *Hincks v. The City of Milwaukee*, 46 Wis., 559. But the principle and reason of these decisions have no application to the case at bar; for all persons contracting with the city to make these improvements are chargeable with knowledge of its exemption from liability to pay under its charter. Besides, the provision is a very common one in the charters of the cities of this state. In whatever view, therefore, we regard the case, we are constrained to hold that the complaint states no cause of action.

By the Court. — The order of the circuit court is reversed, and the cause is remanded for further proceedings.

SEYMOUR vs. LAYCOCK and others.

PLEDGE. (1) *When satisfaction of mortgage valid against pledgee.*

ENTRY OF JUDGMENT. (2) *When entry of judgment without formal order therefor, not error.*

1. Where the advances to secure which a note and mortgage were transferred as collaterals have been paid, a subsequent satisfaction of the mortgage upon the record, by the mortgagee, is valid, although the mortgagor, when he paid the note and procured the satisfaction to be entered, knew that the instruments had been so transferred.

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2. In an equitable action, where the court, by its written conclusions of law on file in the action, declares which party is entitled to judgment, and what judgment he is entitled to, a judgment entered by the clerk in accordance with such decision will not be reversed for want of a formal order directing its entry. *Stahl v. Gotzenberger*, 45 Wis., 121, and *Wadsworth v. Willard*, 32 id., 238, distinguished.

APPEAL from the Circuit Court for *Chippewa* County.

Action to foreclose a mortgage on real estate, executed by the defendants *Henry Laycock and wife* to one Winans, to secure the payment of a promissory note for \$3,700, and ten per cent. interest, made by *Henry Laycock* to Winans or order, dated July 22, 1872, and payable one year after date.

The complaint alleges an assignment of the note and mortgage before maturity, by Winans to the plaintiff, the note having been so transferred by indorsement in the usual way. It also alleges a wrongful satisfaction of record of the mortgage. It prays that the satisfaction be annulled and set aside, and for the usual judgment of foreclosure and sale.

The defendants *Laycock* answered, in effect denying such transfer and assignment, and alleging payment of the mortgage debt to Winans, and the execution by him of a satisfaction of the mortgage, January 13, 1876, duly recorded on the same day.

The following facts were proved, and were found by the court: The defendant worked for Winans, the mortgagee, and paid him some money, after the note and mortgage were given. In the fall of 1874 there seems to have been an accounting between them concerning such work and money, and it was found that the same amounted to more than the mortgage debt. It seems, also, that there was an understanding between them that the same should be applied to the payment of such debt. The satisfaction of January 13, 1876, was executed by Winans pursuant to that understanding.

In April, 1873, Winans indorsed the note, and delivered the same, with the mortgage, to the plaintiff, a banker, as collat-

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eral security for certain future credits which he was to have at the plaintiff's bank. There was no written assignment of the mortgage. At that time Winans had overdrawn his account at the bank \$800 to \$1,000. He continued to do business with the plaintiff through the bank, and, during the ensuing five years, paid into the bank over \$30,000. The balance of his account was sometimes in favor of the bank, and at other times in favor of Winans, but it does not seem that the account was ever stated or adjusted between them.

December 4, 1875, the plaintiff accepted a draft drawn on him by Winans for \$1,000, payable one year after sight, with ten per cent. interest; and June 27, 1876, he accepted another draft for \$2,000, also drawn on him by Winans, payable in six months, with like interest. These acceptances were for the accommodation of Winans, and the plaintiff paid the drafts at maturity.

These two drafts represent the whole amount of Winans' indebtedness to the plaintiff, all other credits given him by the plaintiff having been fully paid.

The principal questions litigated on the trial were: 1. Did *Laycock* know when he paid the mortgage debt—that is, when he accounted with Winans in the fall of 1874,—that the note and mortgage had been transferred by Winans? 2. Were the note and mortgage transferred to the plaintiff as security for all the future overdrafts of Winans, without regard to the time when made?

The findings of fact answer both questions in the negative. The finding on the last question is as follows:

"10. That shortly after said Winans received said note and mortgage from *Laycock*, he delivered the same to the plaintiff as collateral security, for the purpose of securing to the plaintiff the payment of about \$800, then due plaintiff from Winans, and also to secure plaintiff from overdrafts that might be made by Winans on plaintiff's bank during the summer of 1873."

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The conclusions of law are all in favor of the defendants. The last conclusion is as follows:

"That the plaintiff is not entitled to a judgment of foreclosure and sale, but that the defendants *Henry Laycock* and *Emma Laycock*, his wife, are entitled to judgment in this action, that this action be dismissed, and that said note and mortgage be delivered up to said *Henry Laycock*, and that the defendant *Laycock* have judgment for the costs and disbursements."

Without further order of the court, the clerk entered judgment for the defendants as indicated in the above conclusions of law. The plaintiff appealed from the judgment.

The cause was submitted for the appellant on briefs of *J. S. Carr*.

For the respondents, there was a brief by *Bingham & Pierce*, and oral argument by *Mr. Bingham*.

LYON, J. 1. The proof is conclusive that all of the indebtedness of Winans, the mortgagee, to the plaintiff, down to December 4, 1875, the date of the first acceptance, has been fully paid. If the note and mortgage in suit were transferred to the plaintiff as collateral for credits given by him to Winans during the season of 1873 only, the title to the securities reverted to Winans upon payment of his indebtedness to the plaintiff contracted during that season, and the plaintiff has no further interest in them. In that event, the satisfaction of the mortgage executed by Winans is operative to discharge it. Moreover, if the tenth finding of fact is upheld, it is conclusive against the plaintiff's right to maintain this action; and it is not material that the defendant *Henry Laycock* had notice of the transfer of the securities to the plaintiff, if he had such notice.

The evidence discloses but one negotiation between Winans and the plaintiff in respect to the transfer of the note and mortgage, and that occurred when the securities were delivered to

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the latter in the spring of 1873. The only testimony of the terms on which the securities were so transferred, is that given by the plaintiff's cashier, F. D. Barnett, who negotiated on behalf of the plaintiff with Winans for the transfer. He testifies that the plaintiff was present at the negotiation; but neither the plaintiff nor Winans (both of whom testified in the case) gave any testimony on the subject.

On his examination in chief, Barnett testified that he negotiated the transaction in April or May, 1873; that the note and mortgage were transferred to the plaintiff to secure an extension of credit at plaintiff's bank to Winans; and that such extension was the privilege to draw checks on the bank to the amount of the note. On his cross-examination he sums up the whole transaction as follows:

"Winans came in just before he was going down to run lumber for the season on the Mississippi, and placed the note in my hands with the remark that he wanted to leave it with me as collateral for his account or credit that he expected he would have or wanted of us during the time he was gone, or until he should settle up with the bank; and we replied that we would accept it. We did not look over the account with Winans to see how we stood.

"*Ques.* Has Mr. Winans paid any portion of this amount?
Ans. Well, he may have paid it, but the account has been open ever since. It has been a running account with the bank ever since. It has been in and out both ways. Winans has not paid the account for which the note and mortgage were pledged. He has paid as much as the note and mortgage amounted to, and more too."

The foregoing is substantially the whole evidence of the terms upon which the securities were transferred.

The transaction was at Chippewa Falls. Winans was about going down to run lumber *for the season* on the Mississippi. His proposition, accepted by the plaintiff, was to leave the note with the plaintiff's cashier or bank as collateral for his

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(Winans') account or credit that he expected he would have or wanted "*during the time he was gone;*" that is, during the season for running lumber in 1873. This seems very clear. The proposition that the securities should be so held "until Winans should settle up with the bank," does not necessarily signify anything more than that the plaintiff or his agent should hold them until Winans should pay the indebtedness to secure which they were pledged. We do not perceive how it can be construed as extending the security to debts contracted after the time specified.

In view of his other testimony, the statement of the witness that "Winans has not paid the account for which the note and mortgage were pledged," must be regarded as his construction of the contract to which he testifies, rather than as a statement of fact.

Entertaining these views of the evidence, we cannot disturb the tenth finding of fact. The debt which the note and mortgage were transferred to secure having been fully paid, the plaintiff cannot maintain this action.

2. The judgment was entered by the clerk without any formal order of the court directing him to do so. This is alleged to be irregular practice, and is assigned as error on the authority of *Wadsworth v. Willard*, 22 Wis., 238, and *Stahl v. Gotzenberger*, 45 Wis., 121.

The proposition decided in *Wadsworth v. Willard* is, that a judgment by confession, without action, must be signed by a judge or court commissioner, and is void without such signature. In the other case, an action in equity had been tried as a legal action, and the clerk entered judgment upon a verdict without any order or finding of the court. We reversed the judgment so entered, on the ground, as stated by Mr. Justice TAYLOR in the opinion, that "in equitable actions, where the issues must be determined by the court, the clerk has no authority to enter judgment until the court has in some way declared what the nature of the judgment shall be, and then

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the clerk, as the mere hand of the court, enters upon the records the judgment so declared."

In the last conclusion of law the court declared its judgment in this case, and we think that is sufficient authority to the clerk to enter the judgment so declared, although the court made no express order directing him to do so.

By the Court.—The judgment of the circuit court is affirmed.

THE STATE VS. DOXTATER.*Jurisdiction of state over tribal Indians.*

1. The jurisdiction of a state, when not restricted by existing treaties with Indian tribes, or by the act admitting such state into the Union, and except so far as it is restricted by the authority of congress under the federal constitution to "*regulate commerce* with the Indian tribes," extends to all members of such tribes within the territorial limits of the state.
2. The criminal laws of this state apply to the Indians on their reservations within the state; and the circuit court for Brown county has jurisdiction of all violations of such laws committed, whether by Indians or others, in the Oneida reservation, which is included within the boundaries of that county as fixed by law.

CERTIFIED on exceptions from the Circuit Court for *Brown County*.

The case is stated in the opinion.

The cause was submitted on the brief of *John J. Tracy* for the defendant, and that of the *Attorney General* for the state.

Defendant's counsel contended, that if the omission of the legislature to except the members of the Oneida nation, on its reservation, from the operation of our criminal statutes, makes them liable to the penalties therein described, then the omission to except them from the operation of our civil laws

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must work the same result. Against this view of the authority of the state legislature and of the effect of the statutes, counsel argued substantially as follows: 1. In the treaty of December 2, 1794, the Oneidas are styled a "nation." In the treaty of 1784 with the "Six Nations," it is provided that the "Oneida Nation" shall be secured in the possession of the lands on which they are settled; the treaty of 1789 again confirms the "Oneida Nation" in the possession of its lands; and the treaty of Nov. 11, 1794, confirms the "Oneida Nation" in possession of the lands held by it by virtue of treaties with the state of New York; and it cedes to the United States the right to make a wagon road through the Indian territory. 7 U. S. Stats. at Large, pp. 15, 33, 44, 47-8. Prior to 1825, the Oneida Indians had left the state of New York, and established themselves on territories including their present reservation, which had been ceded to them by the Menomonees. 7 U. S. Stats. at Large, p. 272; p. 274, art. VIII.; pp. 242-3, 550. By the treaty of February 8, 1831, the Menomonees ceded to the United States, for the use of the New York Indians, territory including that now held by the Oneidas. By that treaty the Menomonee *nation* claimed nearly all of Wisconsin and Michigan. 7 U. S. Stats. at Large, p. 345, par. 6. This treaty was modified by the U. S. Senate, and a new treaty was made October 27, 1832, ceding to the United States for the New York Indians, lands including the present Oneida reservation. 7 U. S. Stats., 405-7. On the last page cited, the preamble recites that George B. Porter, "the agent of the United States," after failing in one object, "endeavored to procure the assent of the said chiefs and head men of the Menomonee nation to the best practicable terms short of those proposed by the senate;" and that, "after much labor and pains, entreaty and persuasion," he obtained the consent of the Menomonees to certain terms. Following this treaty (p. 409) is a request from the New York Indians that the same may be ratified, because they believed that the terms proposed were the best that could

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be obtained from the Menomonees. In 1838, the present Oneida reservation was provided for; and it is declared that these lands are to be held as other Indian lands are held. 7 U. S. Stats. at Large, 556. The treaties with the Menomonees show how complete was the right which the United States recognized them as having in their lands. The act of congress establishing the territorial government of Wisconsin, contains a proviso, "that nothing in this act contained shall be construed to impair the rights of *person* or property now appertaining to any Indians within the said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to impair the obligations of any treaty now existing between the United States and such Indians, or to impair or anywise to affect the authority of the United States to make any regulations respecting such Indians, their lands, property or other rights, which it would have been competent to the government to make if this act had never been passed." As to the treaties above cited, counsel contended that they recognize the Oneida tribe of Indians as an independent nation, whose territory the United States have no right to intrude upon, except as the right is expressly conceded by treaty; and that none of them concede to the general government any right to interfere with that nation in its management of its internal concerns according to its laws and customs. Counsel also cited *The Cherokee Nation v. Georgia*, 5 Pet., 1, and *Worcester v. Georgia*, 6 id., 515, and quoted at length from the prevailing opinions in those cases, as establishing the doctrine that an Indian nation, living on its own reservation, though within the bounds of a state, while not a "foreign state" so as to be entitled to sue in the courts of the United States, is yet a distinct political community, with the right of self-government, dependent on no other power in the management of its internal concerns, punishing offenses under its own laws, and possessed of exclusive authority within its own territorial boundaries. In support of the same view he also

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cited the language of KENT, J., in *Goodell v. Jackson*, 20 Johns., 693.

The *Attorney General*, as to the general authority of the state over all places within its territorial limits, cited the first section of the enabling act, the first section of the act admitting this state into the Union, and secs. 1, 4, ch. 1, R. S. He contended that the criminal jurisdiction of a state is coëxtensive with its legislative power, or in other words with its territory (*U. S. v. Bevans*, 3 Wheat., 386-7); and as to the general criminal jurisdiction of the circuit courts, he cited sec. 8, art. VII of the state constitution. He also contended that the title to the tracts of land in the reservation is in the United States (Treaty of 1827, art. III, 7 U. S. Stats. at Large, 304); and that they are expressly "subject to such regulations and alteration of tenure as congress and the president of the United States shall from time to time think proper to adopt." Treaty of 1831, art. I, 7 U. S. Stats. at Large, 342. After observing that the reservation in question lies near to the city of Green Bay, is from twelve to fifteen miles in length by from eight to ten miles in breadth, and is within Brown and Outagamie counties, and that the inhabitants of those two counties nearly surround it, and have daily intercourse with the Indians resident upon it, and that a railroad connecting distant parts of the state runs through the reservation, he cited, as to the jurisdiction of the state over crimes committed within such a reservation, *U. S. v. Ward*, McCahon, 199; *U. S. v. Stahl*, id., 206; *Clay v. The State*, 4 Kans., 49; *U. S. v. Cisa*, 1 McLean, 255; *U. S. v. Bailey*, id., 234; *U. S. v. Sa-coo-da-cot*, 1 Abb., U. S., 386; *State v. Foreman*, 8 Yerg., 256-318; *Caldwell v. State*, 1 Stew. & Port., 327; *State v. Tassels*, Dudley (Ga.), 229; *State v. Ta-cha-na-tah*, 64 N. C., 614. He also distinguished the case of *Worcester v. Georgia*, in which the statute of Georgia was in conflict with an act of congress.

TAYLOR, J. The defendant was tried upon an information

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for adultery, in the circuit court for Brown county in this state, and found guilty by the verdict of the jury. The proof showed, and it was admitted upon the trial, that the adultery was committed at the house of the defendant and within the limits of the Oneida reservation; that the defendant was an Oneida Indian, and a member of the tribe of the Oneidas living on said reservation; and that the woman with whom he committed the adultery was a married woman, not an Indian or a member of the tribe.

After the conviction, the defendant moved to set aside the verdict, on the following grounds: "That the said alleged crime, as charged in the information, was committed within the territorial limits of the said Indian reservation, and out of and beyond the jurisdiction of said court, and not within the county of Brown or elsewhere within the jurisdiction of said court; that the defendant, at the time of his arrest for said alleged crime, was at his house upon the Oneida Indian reservation, and not within either the criminal or civil jurisdiction of said court, or of the state of Wisconsin; that the state ought not to maintain said action against him, because of his being an Indian and a member of the Oneida nation of Indians; that various treaties have from time to time been made and entered into by the government of the United States with the Chipewewa, Winnebago, Menomonee, and Oneida nations of Indians, whereby the Oneida reservation of lands was set apart as a home for said Oneida nation of Indians, and said reservation has been held by them as such reservation ever since the year 1825, which treaties have been duly ratified by the senate of the United States; and that, by the terms of said treaties and the laws of the United States, the government of the United States granted to them their present territorial reservation, acknowledging said Oneida nation to be a sovereign nation, and, by virtue of such treaties and laws of the United States, the Oneida nation are authorized and empowered to govern themselves according to their own usages and customs; that

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said Indians are under the protection of the United States, and are free from any right of legislative interference by the state; that by the said treaties and laws of the United States, passed for the protecting and governing of the various Indian tribes on the frontiers, the Oneida Indian reservation of land has been set off and guarantied to them for a home, all of which treaties and laws are existing treaties and laws at this day in full force; and that the treaties and laws of the United States contemplate that the Indian territory is completely separate from that of the states, over which Indian territory, and the Indians therein, the state law has no force."

Other grounds were alleged why the verdict should be set aside; but the foregoing sufficiently shows the ground of exceptions in the case. The circuit judge refused to set aside the verdict, and the defendant filed exceptions under the statute, and the same are certified to this court.

The Oneida reservation is within the boundaries of the state of Wisconsin, and also within the boundaries of Brown county, as fixed by law.

The exception presents the grave questions: *first*, whether the state is powerless to punish an act which is declared a crime by the laws of this state, if such act be committed within the limits of the Oneida reservation in this state; and *second*, whether an Indian belonging to the Oneida tribe or nation, and living upon such reservation, can be punished by the laws of this state for any crime committed by him within the limits of such reservation.

In order to deprive the state of its power to exercise one of the most important attributes of sovereignty — the punishment of crime, the protection of the lives, persons and property of those within its borders, and the preservation of peace and good order in every part of the state, — the party alleging the want of such power must show most clear and incontrovertible reasons why such power should not be assumed and exercised.

In order to exempt these Indians, living upon their reserva-

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tion within this state, from the jurisdiction of its courts and laws, it must either appear that the territory upon which they reside is no part of this state; or that, although such territory is a part of the state, the Indians are an independent nation and not subject to its laws; or that, by reason of some treaty existing between them and the United States, the state has no authority to extend its laws over them.

Notwithstanding the many controversies over the question as to how far the Indian tribes within the boundaries of the United States are distinct communities, having a kind of independent national existence, still we are of the opinion that as to those tribes living outside of the boundaries of any of the states, the government of the United States has always claimed and exercised the right to legislate for them, and to extend the laws of the United States over the territory occupied by them.

Though in some respects the United States have treated them as distinct peoples, and have from time to time made treaties with them, yet in no case have they treated them as foreign nations. If the United States have accorded to them any of the attributes of a nation, it has been limited always by the express qualification that they were within and under the power and jurisdiction of the United States, and, as was said in the case of *The Cherokee Nation v. The State of Georgia*, 5 Peters, 1, by Chief Justice MARSHALL, in commenting upon the peculiar relations of the Indian tribes to the United States: "The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two peoples in existence. In general, nations not owing a common allegiance are foreign to each other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions, which exist nowhere else." He then goes on to show that all the territory occupied by the Indians is admitted to be within the United States, and within its jurisdictional limits, and the ultimate right to the soil of the lands occupied by the tribes is claimed by the United States, and then adds: "It may well

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be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian. . . . They and their country are considered by foreign nations, as well as by ourselves, as being completely *under the sovereignty and dominion of the United States*, and any attempt to acquire their lands or to form a political connection with them would be considered by all as an invasion of our territory and an act of hostility." Justice JOHNSON, in the same case, asks the question: "By what attributes is the Cherokee nation identified with other states? The right of sovereignty was expressly assumed by Great Britain over their country at the first taking possession of it, and has never since been recognized as in them, otherwise than as dependent upon the will of a superior. The right of legislation is in terms conceded to congress by the treaty of Hopewell [a treaty made with the Cherokees], whenever they choose to exercise it; and the right of soil is held by the feeble tenure of hunting grounds, and acknowledged on all hands subject to a restriction to sell to no one but the United States. . . . They have in Europe sovereign and demi-sovereign states, and states of doubtful sovereignty. But this state, if it be a state, is still a grade below them all; for not to be able to alienate without permission of the remainderman or lord, places them in a state of feudal dependence."

In the same case Justice BALDWIN says (p. 49): "While the different nations of Europe respected the rights of the natives as occupants, they asserted the ultimate dominion to be in themselves, and claimed and exercised, as a consequence of this ultimate dominion, the power to grant the soil while yet in

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the possession of the natives. These grants have been understood by all to convey a title to the grantees subject only to the Indian right of occupancy. . . . I feel it my duty to apply them to this case. They are in perfect accordance with those on which the governments of the united and individual states have acted in all their changes; they were asserted and maintained by the colonies before they assumed independence. While dependent themselves on the crown, they exercised all the rights of dominion and sovereignty over the territory occupied by the Indians; and this is the first assertion by them of rights as a foreign state within the limits of a state. If their jurisdiction within their boundaries has been unquestioned until this controversy—if rights have been exercised which are directly repugnant to those now claimed,—the judicial power cannot divest the states of rights of sovereignty, and transfer them to the Indians, by decreeing them to be a nation, a foreign state preëxisting and with rightful jurisdiction and sovereignty over the territory they occupy. This would reverse every principle on which our government has acted for fifty-five years, and force, by mere judicial power, upon the other departments of this government and the states of this Union, the recognition of the existence of nations and states within the limits of both, possessing dominion and jurisdiction paramount to the federal and state constitutions. It will be a declaration, in my deliberate judgment, that the sovereign power of the people of the United States and Union must hereafter remain incapable of action over territory to which their rights in full dominion have been asserted with the most rigorous authority, and bow to a jurisdiction hitherto unknown, unacknowledged by any department of the government, denied by all through all time, unclaimed till now, and now declared to have been called into exercise, not by any change in our constitution, the laws of the Union or the states, but preëxistent and paramount over the supreme law of the land.”

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The foregoing remarks were made in a case involving the claim of the Cherokee Indians, one of the most powerful tribes in the United States, to be an independent nation, and their claim was denied. In the case of *State of New York v. Dibble*, 21 How., 366, in which it was alleged that a law of the state of New York which prohibited a white man from intruding upon the reservation of the Seneca Indians in that state, was void as being in conflict with the laws of congress or the constitution of the United States, Justice GRIER, who delivered the opinion of the court, says: "Notwithstanding the peculiar relations which these Indians hold to the government of the United States, the state of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the commonwealth, and protect these feeble bands from imposition and intrusion. The power of the state to make such regulations to preserve the peace of the commonwealth is absolute, and has never been surrendered." In the case of *United States v. Rogers*, 4 How., 567, which was the case of an indictment for murder committed within the territory of the Cherokee Indians, Chief Justice TANEY says: "The country in which the crime is charged to have been committed is part of the territory of the United States, and not within the limits of any particular state. It is true that it is occupied by the tribe of Cherokee Indians. But it has been assigned to them by the United States as a place of domicil for the tribe, and they hold and occupy it with the assent of the United States, and under their authority. The native tribes who were found on this continent at the time of its discovery, have never been acknowledged or treated as independent nations by the European governments, nor regarded as the owners of the territories they respectively occupy. On the contrary, the whole continent was divided and parcelled out, and granted by the governments of Europe as if it had been vacant and unoccupied land,

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and the Indians continually held to be, and treated as, subject to their dominion and control.

"It would be useless at this day to inquire whether the principle thus adopted is just or not; or to speak of the manner in which the power claimed was in many instances exercised. It is due to the United States, however, to say that while they have maintained the doctrine upon this point which had been previously established by other nations, and insisted upon the same powers and dominion within their territory, yet from the very moment the general government came into existence, to this time, it has exercised this power over this unfortunate race in the spirit of humanity and justice. . . . It is our duty to expound and execute the law as we find it; *and we think it too firmly and clearly established to admit of dispute, that the Indian tribes residing within the territorial limits of the United States are subject to their authority, and when the country occupied by them is not within the limits of one of the states, congress may by law punish any offense committed there, no matter whether the offender be a white man or an Indian.*"

In 1856 the Hon. Caleb Cushing, as attorney general of the United States, in giving an opinion upon the question of the citizenship of Indians, says: "The simple truth is plain, that the Indians are *subjects* of the United States, and are not, in mere right of home birth, citizens of the United States. The two conditions are incompatible. The moment it comes to be seen that the Indians are domestic subjects of this government, that moment it is clear to the perception they are not the sovereign constituents of the government." 7 Opinions of Attorneys General, 749.

Again, in 8 Opinions of Attorneys General, the same learned attorney general says: "There was a time when the true relation of Indians to the United States was not so clearly seen as it now is. We had been accustomed to make treaties with

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them as if they were independent of us ; that was an error. We dealt with their petty tribes as nominal nations; that led to strange misconceptions. We had respected their assumed rights; that is, had left them to their savage *quasi* independence, instead of, by force, compelling them to enter into some appropriate place in the social organization; and thus they had perished of too much liberty.

"The elaborate investigations of the subject which ensued cleared off all these errors; and discussion ended with the great case of *The Cherokee Nation v. Georgia*, 5 Peters, 1, and *Worcester v. Georgia*, 6 Peters, 515.

"It is the universal doctrine of public law, that the Indians are the domestic subjects of the particular European or American state in which they may happen to be."

The very treaties made by the United States with these tribes clearly show that the United States not only claimed jurisdiction over them, and the right to pass laws for their government, but that when this right was relinquished by the government in any case, and given to the tribes, it was accomplished by a grant of power from the United States to such tribes, and not assumed as an existing right inherent in the tribes, which the United States could not abrogate by virtue of its sovereignty.

In all the early treaties with these tribes it was expressly stipulated, that if any citizen or inhabitant of the United States should commit any crime within the Indian territory upon or against persons, property or rights of the Indians, such person should be tried and punished by the courts of the United States, and not by the laws or customs of the Indians; and that if any Indian committed any robbery or murder or other capital crime on a citizen or inhabitant of the United States, either within or without the Indian territory, such Indian should be delivered up and punished according to the laws of the United States. The fifth article of the treaty made with the Cherokees, ratified May 23, 1836, agrees that the

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lands ceded to the Cherokee nation by that treaty shall not at any time thereafter, without the consent of the Indians, be included within the territorial limits or jurisdiction of any state or territory. *But the United States shall secure to the Cherokee nation the right, by their national councils, to make and carry into effect all such laws as they may deem necessary for the government and protection of the persons and property within their own country, belonging to their own people, or such persons as may have connected themselves with them;* provided, that they shall not be inconsistent with the constitution of the United States, and such acts of Congress as have been or may be passed regulating trade and intercourse with the Indians.

By the fourteenth article of the treaty with the Creek Indians, approved March 24, 1832, the United States guaranty the Creek country west of the Mississippi to the tribe, and agree that no state or territory shall ever have a right to pass laws for the government of such Indians, but they shall be allowed to govern themselves, so far as may be compatible with the general jurisdiction which congress may think proper to exercise over them.

These provisions in the treaties above referred to show that when the Indians claim the right to govern themselves, such right is secured to them by the United States, and that it is not a right inherent in the tribe or nation, which cannot be interfered with by the United States or by the states within which they may be inhabitants. I am unable to find any such provision in any of the treaties made either with the Menomonee, Winnebago or other Indians who occupied the territory which now comprises the state of Wisconsin, or with the Oneida tribe or nation, as to the lands occupied by them in this state; but art. 4 of the treaty of June 10, 1838 (7 U. S. Stats. at Large, 552), provides that the lands secured to them west of the Missouri river, under that treaty, "shall never be included in any state or territory of the Union."

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The treaty with the Shawnees made in 1831, in its article 11, contains a provision by which the United States guaranty that the lands granted to the Senecas and Shawnees "shall never be within the bounds of any state or territory, nor subject to the laws thereof."

That it has always been the settled policy of the United States to treat the Indians as dependent upon the government, and, in the language of Attorney General Cushing, "domestic subjects," is further evidenced by the fact that by chapter 120 of the acts of congress, passed in 1871 (U. S. Stats. at Large, 566), it was expressly declared "*that no Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe or power with whom the United States may contract a treaty.*" And this law is now section 2079 of the Revised Statutes of the United States.

It seems that from these provisions of the treaties made, and the opinions of the judges of the supreme court and attorney general of the United States, and the general course of legislation respecting the Indian tribes, it is conclusively to be inferred that, in the absence of any treaty or stipulation, the United States, as to those tribes not within any state, have full jurisdiction to pass laws for their government in both civil and criminal matters. *United States v. Rogers*, 4 How., 567. As to those who reside within the limits of any of the states, they, like all other inhabitants or residents, or persons found within the boundaries of such states, must be subject to the laws thereof, unless by some treaty with the United States they are exempted from its jurisdiction, or by the provisions of the constitution of the United States they are not subject to the jurisdiction or laws of the state.

Unless the jurisdiction of the state over the territory occupied by the Indians within its boundaries is prohibited by the act admitting the state into the Union, or by some existing treaty with the Indians occupying such territory at the time of its

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admission, there does not seem to be any authority in congress to pass laws for the government or control of such Indians, or to prohibit the states from passing such laws, except the provision of the constitution which authorizes congress to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. Under this provision of the constitution, congress has passed laws regulating trade with the Indians, requiring the taking out of licenses for that purpose, prohibiting the selling of intoxicating liquors to them, and other things which come within the power to regulate commerce; but it never has been contended that under this provision congress had the power to pass laws generally for the punishment of crimes committed on these reservations, either by the Indians or by other persons. See *Worcester v. The State of Georgia*, 6 Peters, 515; *United States v. Holliday*, 3 Wall., 407; *United States v. Bailey*, 1 McLean, 234. In the last case it was held, that, under this power to regulate commerce with the Indian tribes, congress cannot exercise a general jurisdiction over an Indian territory within a state. See also *United States v. Ciska*, id., 254.

That, whilst the Indian reservations are within the limits of the United States, although within an organized territory of the United States, congress may assume a general jurisdiction over the reservations and the Indians thereon, when not prohibited by treaty stipulation, is affirmed in the case of *United States v. Bailey*, *supra*. On page 237 the court says: "But the act under consideration asserts a general jurisdiction for the punishment of offenses over the Indian territory, though it be within the limits of a state. To the exercise of this jurisdiction within a territorial government there can be no objection; but the case is wholly different as regards Indian territory within the limits of any state. In such case the power of congress is limited to the regulation of commercial intercourse with such tribes of Indians that exist as a distinct community, governed by their own laws, and resting for their protection

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on the faith of the treaties and the laws of the Union. Beyond this the power of the federal government, in any of its departments, cannot be extended."

Under the territorial government of Wisconsin, it was not disputed but that the courts of the United States could punish a crime committed by a tribal Indian, even when committed upon the Indian territory. See *Mauzaunauke v. The United States*, 1 Pin., 124. If the power to punish the Indians for crimes, whilst existing in tribes, was vested in the United States whilst they lived within the territories of the United States, then that power passed to the state when it was admitted to the Union (unless, as before stated, some treaty with the United States prevented the exercise of such jurisdiction), under the tenth amendment to the constitution of the United States, which provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

There is, perhaps, some general language used by Justice DAVIS in his opinion in the case of *The Kansas Indians*, 5 Wall., 737, 755, which seems to be in conflict with the opinion above expressed; but this was a case simply involving the right of the state of Kansas to tax the lands of these Indians, and the only point decided was that the state had no right, under the treaties with these Indians, to tax their lands, and what was said outside of this question was *obiter*, and entitled only to that respectful consideration which the opinion of a learned and experienced judge demands of the court. The conclusion that Indian lands are not subject to taxation by the state, does not by any means prove that the Indians themselves may not be subject to its criminal laws.

The courts of the states of New York, North Carolina, Tennessee, Arkansas, Kansas, Alabama and Georgia, and the circuit court of the United States for the seventh and eighth circuits, hold that the states, unless prohibited by treaties made

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with the United States, or by some reservation made in the act admitting the state into the Union, have jurisdiction to extend their criminal laws over the tribal Indians and their reservations situate within their boundaries. *United States v. Bailey* and *United States v. Cisna*, *supra*; *United States v. Sa-coo-da-cot*, 1 Abb. U. S. Cir. Ct. R., 377; *Goodell v. Jackson*, 20 Johns., 693; *Murray v. Wooden*, 17 Wend., 531; *Peters' Case*, 2 Johns. Cases, 344; *Clay v. State*, 4 Kansas, 49; *Hicks v. Ew-har-to-nah*, 21 Ark., 106; *People v. Antonio*, 27 Cal., 404; *United States v. Stahl*, 1 Woolworth C. C. R., 192; *State v. Foreman*, 8 Yerger, 256; *United States v. Rogers*, *supra*; *Caldwell v. State*, 1 Stewart & Porter, 327; *State v. Tassels*, Dudley (Ga.), 229; *State v. Ta-cha-na-tah*, 64 N. C., 614.

After the decision in the case of the *United States v. Bailey*, *supra*, in which the circuit court of the United States held that the United States courts had no authority to punish a crime committed within an Indian reservation situate within the boundaries of a state, unless such right had been reserved in the act admitting the state into the Union, or the jurisdiction of the state over such reservation had been expressly taken from the state at the time of its admission, congress, acknowledging the soundness of that decision, repealed the act of 1817, being chapter 92 of the laws of congress of that year (3 U. S. St. at Large, 383), which had attempted to confer the power upon the courts of the United States to punish for crimes committed in such reservations even when within the boundaries of a state. The first section of the repealed act read as follows: "If any Indian or other person or persons shall, within the United States and within any town, district or territory belonging to any nation or nations, tribe or tribes of Indians, commit any crime, offense or misdemeanor, which, if committed in any place or district of country under the sole and exclusive jurisdiction of the United States, would by the laws of the United States be punished with death or any other pun-

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ishment, every such offender, on being thereof convicted, shall suffer the like punishment as is provided by the laws of the United States for the like offenses, if committed within any place or district of country under the sole and exclusive jurisdiction of the United States." The other sections of the act provided for the trial of all such offenses in the courts of the United States. This act was repealed June 30, 1834, shortly after the decision in Bailey's case, and congress then passed a general law regulating trade and intercourse with the Indian tribes; and the first section of that act defines what shall thereafter constitute and be deemed the Indian country. The definition is as follows: "All that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and also that part of the United States east of the Mississippi river, and not within any state, to which the Indian title has not been extinguished." The twenty-fifth section of the act provides "that so much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country; provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The laws above quoted show beyond all doubt that the United States had assumed the power to extend the criminal laws of the United States to all Indians living within its jurisdiction. The first act, of 1817, undertook to punish the Indians for crimes committed by them against the persons and property of Indians, as well as those against the persons and property of white persons; and the law of 1834 extended the jurisdiction to all crimes except those committed by one Indian against the person or property of another, and limited the jurisdiction to the Indian country as defined by that act, so as not to assert the power to punish for crimes committed on the Indian reservations lying within the boundaries of any

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state. It follows that after the passage of the act of congress of 1834, upon the formation of any state out of the country designated in that act as the Indian country, and its admission into the Union on equal terms with the original states, the jurisdiction of the United States to punish for crimes committed upon the Indian reservations within such state would be lost, unless reserved by the act admitting such state into the Union. And the power to punish crimes after that, upon the reservations within the state, must be either vested in the state or remain with the tribes themselves. But the authorities above cited abundantly show that the power to punish crimes committed by these tribal Indians, whether committed within their reservations or in other places within the state, is vested in the state. The jurisdiction of the state, when not restricted by existing treaties made with the tribes, or by the act admitting the state into the Union, is supreme over the subject, and extends to all persons and places within the state.

The only other question necessary to consider is, whether the criminal laws of this state were intended to apply to the Indians living upon the reservations therein. Upon this point, we think, there can be no doubt; and, admitting the power to exist in the state, the learned counsel for the defendant hardly contends that they do not apply. The second section of the Revised Statutes of 1849 declared that the jurisdiction and sovereignty of the state should extend to all places within the boundaries thereof. The second section of the revision of 1858 is a reënactment of that section; and in the revision of 1878, it is made the first section thereof. This section clearly shows that all laws passed by the state are to have effect in all parts thereof, and upon all persons, unless the laws themselves are local or private.

As a strong ground of inference that Indians are included within the laws when not excepted from their provisions, we find that in several of the laws of a general nature, which it was intended should not extend to Indians, they are expressly

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exempted from their provisions. The law for the assessment and collection of taxes exempts from taxation the property of all Indians not citizens, except lands held by them by purchase. The game laws generally except Indians. See section 4566, R. S. 1878, which expressly provides that certain game laws shall not "apply to tribal Indians on their reservations." The law defining who shall be electors expressly excludes tribal Indians. As evidence that the state intends its jurisdiction should extend to these tribal Indians, the legislature very early legislated upon the subject of selling or giving intoxicating liquors to Indians, or keeping for the purpose of selling or giving to them any intoxicating liquors at any place upon the land belonging to or occupied by them under treaty stipulation of the United States within this state. The same statute provides for the arrest of an Indian when found drunk, whether upon such Indian territory or not. See R. S. 1878, sections 1566-1569, inclusive, which are but reenactments of laws which were in existence here before the state was admitted into the Union, and have been continued to the present time.

We have no doubt that the criminal laws of the state apply to the Indians on their reservations within this state.

There can be no doubt of the jurisdiction of the circuit court for Brown county over the territory of the Oneida reservation. The reservation lies wholly within the boundaries of that county, as fixed by the laws of the state; and that court has, therefore, jurisdiction of all crimes committed within its borders.

We are of the opinion that the defendant was properly convicted.

By the Court. — The exceptions of the defendant are overruled, and the cause remanded with directions to the circuit court to proceed to judgment against the defendant.

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THE STATE VS. HARRIS.

Jurisdiction of state over tribal Indians.

The criminal laws of this state extend to all parts of the state, including the Oneida reservation. *State v. Duxtater, ante*, p. 278.

CERTIFIED on Exceptions from the Circuit Court for Brown County.

The cause was submitted on the brief of *John J. Tracy* for the defendant, and that of the *Attorney General* for the state.

TAYLOR, J. The opinion in the case of *The State v. Duxtater, ante*, p. 278, disposes of the exceptions of the defendant in this case adversely to her. In that opinion it is expressly held that the criminal laws of the state extend to all parts of the state, including the Oneida reservation, within the boundaries of which the offense charged against the defendant was committed; and as the evidence shows that she was not an Indian, and did not belong to the tribe of Oneida Indians, there can be no pretense that she was not subject to the criminal laws of the state, on any grounds personal to herself, as was claimed in the case of *Duxtater*.

By the Court.—The exceptions of the defendant are overruled, and the cause remanded with directions to the circuit court to proceed to judgment against the defendant.

JENSEN VS. THE BOARD OF SUPERVISORS OF POLK COUNTY.

STATE ROADS: CONSTITUTIONAL LAW: STATUTE CONSTRUED. (1) *Ch. 223 of 1875 construed: What expenses chargeable to counties thereunder.* (2) *Effect of failure to give a certain notice.* (3-6) *Power of the legislature as to constructing state roads, and compelling levy of taxes by counties, towns and cities.*

1. Ch. 223 of 1875, which provides for laying out a state road in Polk and Burnett counties, though it may impose upon each of said counties the expense of *laying out* such road therein, does not impose upon it the ex-

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- pense of opening the road, but apparently leaves that expense to be a charge upon the several towns under the general statutes.
- [2. *It seems* that the neglect of the commissioners appointed by said act to give the notice required by sec. 93, ch. 152 of 1869 (Tay. Stats., 502, § 108) not only rendered void their proceedings in laying out and establishing the road as against the land-owners whose land was taken for the road (*State v. Langer*, 29 Wis., 68, and earlier cases in this court), but also rendered void a contract for work on such road let by the commissioners, as against the town which would otherwise be liable for such work.]
 - [3. In the absence of express constitutional restriction, the legislature has power to appoint commissioners to lay out and establish state roads; and the constitutional amendment of 1871 merely limits this power to roads "extending into more than one county."]
 - [4. An act of the legislature appointing commissioners to lay out a state road in two or more counties, and imposing the expense thereof upon such counties, is not in violation of the constitutional provision for uniformity in the system of town and county government. Nor does an act authorizing such commissioners to *open* or construct the road, violate the uniformity of county government. Whether such an act would violate the uniformity of town government, *quære*.]
 - [5. An act of the character above described does not violate the constitutional provision which prohibits the state from carrying on works of internal improvement, nor that which requires the rule of taxation to be uniform.]
 - [6. The legislature has power to compel the levy of taxes by counties, towns and cities for any *municipal* purpose, such as the construction of roads and bridges.]

APPEAL from the Circuit Court for *Polk* County.

Plaintiff filed with the defendant board a claim against Polk county, for work done by him in clearing and grubbing a certain "state road" under contract with persons appointed and acting as commissioners, by virtue of ch. 223, Laws of 1875. His claim having been disallowed, he appealed to the circuit court, where, after a trial without a jury, judgment was rendered in his favor for the amount of his claim. From this judgment the defendant appealed.

S. H. Clough, for the appellant.

For the respondent, there was a brief by *L. P. & J. K. Wetherby*, and oral argument by *J. C. Gregory*.

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TAYLOR, J. This case involves the construction and validity of chapter 223, Laws of 1875, as well as the regularity and validity of the proceedings of the commissioners named in said act.

The act provides for laying out and opening a state road in the counties of Polk and Burnett. One of the main questions in the case arises upon the construction of sections 3, 4, 5 and 6 of said chapter, of which the following are copies:

"Section 3. Upon the filing the order and survey of said road in the office of the county clerk in the several counties through which said road may pass, the said road shall become [a] public highway; and the said commissioners shall have full power to open out said highway, remove obstructions, build bridges, construct drains, corduroys and culverts, and may do the same by contract or otherwise, in the same way and manner, and to the same extent, that supervisors of towns have to open highways in their respective towns.

"Section 4. As a compensation for laying out and opening out said road, said commissioners shall be entitled to the sum of three dollars and fifty cents per day for each day's service rendered in laying out and opening said road. Said commissioners shall have the power to employ such assistants as may be necessary, not to exceed five, who shall receive as compensation not more than one dollar and fifty cents per day; also one surveyor, who shall be entitled to receive not more than five dollars per day for each day's service as surveyor. Said commissioners shall have the power to procure all needful subsistence at a reasonable price, said subsistence to be paid for by the counties through which said road may run, in proportion to the amount used in each county in laying out and opening said road.

"Section 5. There shall not be more than three of said commissioners employed at any time in laying out said road, or in opening said road, and no more than three of said com-

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missioners shall be entitled to compensation for laying out and opening of said road at any one time.

"Section 6. When said commissioners shall have filed an order and survey of said road in the office of the county clerk in each of the counties through which said road shall run, it shall be the duty of the county board of supervisors, in each of those counties, to audit the accounts of said commissioners, on their filing such accounts, properly verified, with said county clerks."

This action is brought by the plaintiff to recover the sum of sixty dollars, which he claims is due to him from the defendant county for clearing and grubbing two acres in said county of Polk, on the line of the road, as the same is claimed to have been located by said commissioners under said act, the work having been done under a contract with said commissioners. He presented his claim to the county board of supervisors of said county; the board refused to allow it; he appealed to the circuit court of said county, and upon a trial in said court he recovered a judgment against the county for the amount of his claim and costs; and the defendant appealed to this court.

The first ground of error alleged, which we shall notice, is, that under the act of 1875, above quoted, the county of Polk is not obligated to pay the plaintiff for the work performed by him in grubbing and clearing said highway, admitting the act to be valid and constitutional.

It is admitted that unless this act renders the defendant liable to pay for such work, the plaintiff was not entitled to recover in the court below. The only general laws applicable to the case are sections 89, 96 and 99, ch. 19, R. S. 1858. Section 89 provides, among other things, that "all state roads which shall hereafter be laid out shall be opened and worked the same as other highways," and contains provisions for appraising the damages of persons whose lands are taken for such roads. Section 96 provides that the commissioners appointed to lay out such highways shall be paid for their ser-

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vices, by the counties through which the road passes, such sum as the supervisors of such counties shall deem just. Section 99 provides that "all damages occasioned by the laying out and opening of any state road shall be paid by the several counties in which the same may be located."

It is clear that under these general provisions the counties in which a state road is located can only be compelled to pay for the services of the commissioners and their assistants in laying out and locating such road, and the damages which may be awarded to the land-owners for lands which may be taken by the laying out and opening thereof, leaving the duty of opening the road for the purposes of travel, and the expense of putting the same in a condition so that it may be traveled by the public, upon the towns in which the same is located. The provision in section 89 that "all state roads shall be opened and worked the same as other highways," clearly throws the expense of such opening and working upon the towns in which they are situated, as the only general laws upon the subject of opening and working highways require that the same shall be so opened and worked by the towns in which they are situated, and by the officers of such towns. This was the construction given to this provision by the state revisers; and in order that there might be no doubt upon this construction of the law hereafter, they made that part of said section read as follows: "All state roads shall be opened and worked as other highways by the several towns in which the same are or may be located." Section 1316, R. S. 1878.

In 1863 the legislature first conferred power upon the several boards of supervisors of the counties to lay out highways in certain cases, and it was provided that, in regard to these roads so laid out, "they should be opened and repaired in the respective towns in the same manner as other highways." Section 7, ch. 133, Laws of 1863; section 134, ch. 152, Laws of 1869; Tay. Stats., 506, § 122. And the county board was given the power to open such highways when the town should refuse to

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do so; but no power was given to work or repair the same by the county. Chapter 117, Laws of 1869, was the first general law which authorizes any county to construct and keep in repair highways. This act was limited to the county of Brown, with a proviso that any other county might adopt the same (specifying the manner in which the same could be adopted). Chapter 152, Laws of 1872, authorized the several boards of supervisors to raise money by taxation to be expended in building and repairing roads in their respective counties. This chapter was amended by chapter 139, Laws of 1876, and is embodied in the Revised Statutes of 1878, secs. 1308 to 1311, inclusive. The law of 1872, as amended by chapter 139, Laws of 1876, provided that after a road which, under the provisions of such law, had been kept in repair by the county, was turned over again to the control of the town in which the same was situated, if the town should refuse to keep the same in repair, the county, after giving such town due notice to repair the same, might repair it, and charge the costs of such repair to the town; and the revisers, in section 1311, R. S. 1878, extended this power to state roads; so that now, if any town shall refuse to keep in repair any state or county road, the county board may cause the same to be repaired at the expense of such town. From an examination of these different laws upon the subject of highways, it will be found that the general rule is, that all highways, whether laid out by the town authorities, the county authorities, or commissioners appointed directly by the legislature, must be opened and worked at the expense of the towns in which they are located; but a general power is, however, given to the county boards of the several counties to raise money for the purpose of keeping *such of the main traveled roads in repair in their respective counties*, as they may adopt for that purpose; and the roads so adopted by the counties, whilst kept in repair by the counties, shall not be under the control of the town authorities, nor shall the town authorities be responsible for injuries resulting by reason of

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their being out of repair whilst under such control. Section 1339, R. S. 1878. There is also a coercive power given to the counties to compel the towns to keep state roads in their respective towns in repair. The only other general law which authorizes counties to expend money upon highways, is section 115, ch. 152, Laws of 1869, now section 1319, R. S. 1878; and this restricts the expenditure by the county to aid in the building of bridges in certain specified cases. The responsibility of opening and keeping in repair the highways of the state, outside of the cities and villages, is devolved upon the towns in which they are situated, irrespective of the authority which lays out and establishes the same; and the towns are not relieved of this responsibility by any general law which compels the opening and repair of the same by the counties.

It follows, therefore, that the county of Polk cannot be compelled to pay for clearing and grubbing this state road by force of any general law upon that subject, and, if compelled to pay, it must be by virtue of the provisions of said ch. 223, Laws of 1875. The general rule and policy of the law is to cast the burden of constructing and repairing such highways upon the towns where located; and, in order to change this policy and cast the burden upon the county, it must clearly appear from the act in question that such was the intent of the legislature. If the legislature have left it in doubt, then we must presume that it intended that the general rule and policy should prevail. Sedgwick on the Construction of Statutory and Constitutional Law, 267, note *a*; *People v. Board of Education*, 13 Barb., 400-409.

Section 6, ch. 223, Laws of 1875, is the only section of the act which has any bearing upon the question. Without that section there could be no pretense that the counties of Polk and Burnett would be liable for the payment of the moneys expended in the opening and construction of the highway authorized to be laid out and opened. Had that section been omitted, the general law must have controlled; and that pro-

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vides that the counties shall only be liable for the damages awarded, and for the services of the commissioners in laying out the same, including, without doubt, pay for the services of their assistants in doing such work.

Sections 4 and 5 of said ch. 228 evidently refer to the work of the commissioners in laying out said road, and not to the work of constructing the same. If section 4 has any reference to the construction of the bridges, drains, corduroys and culverts referred to in section 3, it would be absurd to limit the commissioners to the employment of not more than five assistants, with a limited compensation of \$1.50 each per day, when section 3 had already provided that they might have such work done by contract if they saw fit.

Section 6 provides that when the commissioners shall have filed their order and survey in the proper offices, it shall be the duty of the county board of supervisors in each of the counties to audit the accounts of said commissioners.

This language certainly indicates that the accounts of the commissioners here referred to are for services in laying out and establishing the road, as they are authorized to have such accounts audited immediately after filing the survey and order; and it is clear that they would not be authorized to do anything in the way of opening and constructing such road until after such survey and order were filed. Admitting, for the purposes of this case, that the direction to audit such accounts implies a duty to pay when audited, the language is too restricted to cover the claims of those whom the commissioners might, under section 3, employ to remove the obstructions and construct such road so that the same could be traveled by the public.

Section 3 uses the same language as in section 6: "Upon filing the order and survey in, etc., the road shall become a public highway, and said commissioners shall have full power to open out said highway, remove obstructions, etc., in the same way and manner and to the same extent that super-

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visors of towns have to open highways in their respective towns." This section gives to the commissioners the powers of the supervisors of the respective towns in which the road is located, to open and construct the same, so far as is necessary to make the same capable of being traveled by the public. The expense of doing this work, by the general law, as above shown, is cast upon the towns, and not upon the counties. It would seem that the legislature, in the enactment of section 3, supposed they had done all that was necessary in directing how the road should be opened for the purposes of travel, and to fix the liability upon the towns under the general laws for the expenditures made under that section; and that the remainder of the chapter is directed simply to fixing the compensation of the commissioners and their assistants in laying out the road, and providing for their payment. The language of section 6 is, we think, too restricted and uncertain to change the fixed and general policy of the law, and relieve the towns of the expense of opening the road, and cast the burden upon the county.

If there be no constitutional objection to the act, and if, in construing it according to its letter and apparent meaning, we have misunderstood the intention of the legislature, it will be better to procure an amendatory act which will clearly and without doubt charge the expenses of opening such highway upon the counties in which the same is situated, than that this court should guess at such intention and pervert the apparent meaning of the language used to carry out such supposed intention. Upon the record of the case as it now stands, we have very grave doubts whether either the towns or counties can be held chargeable with the expenses of opening and constructing such road.

The record shows that the commissioners did not give the notice required by section 93, ch. 152, Laws of 1869 (Tay. Stats., p. 502, § 108), but instead thereof posted notices in each of the counties ten days, instead of twenty days in each of the towns, as prescribed in said section 93.

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That the giving of the notice required is jurisdictional, and that the neglect to give it rendered the proceedings of the commissioners void so far as the laying out and establishment of the road is concerned, as against the land-owners whose lands are taken for such road, is settled by the uniform decisions of this court. See *Austin v. Allen*, 6 Wis., 134; *Babb v. Carver*, 7 Wis., 124; *Roehrborn v. Schmidt*, 16 Wis., 519; *State v. Langer*, 29 Wis., 68.

It is urged that these cases are not applicable, and that a different rule must apply when the action is between the town and an individual who has, at the request of the proper officers, performed work in the opening and construction of a highway which the officers of such town claim to have laid out and established, or for doing work upon a highway which has been in fact opened and used by the public as such. It is urged that in cases of this kind the town is estopped, as against the party doing the work, from alleging that such highway was not lawfully laid out and established, or that such highway was not a lawful highway, as well as a highway *de facto*. Whatever the force of this argument might be as applied to the case of work done upon a highway which had been opened and used by the public for any considerable time, it can have little force when applied to the case of work done in opening the road in the first instance, and putting it in condition for public use as a highway; and still less in a case like the one at bar, where the road is laid out and the work done under officers, not of the town or county, but appointed by the legislature, and the whole proceeding, so far as the towns or counties are concerned, are "*in invitum*." In such case, it seems to me that in order to charge the counties or towns for work done under the contracts made with such officers, the claimant must show that the work was done under a contract which such officers were by law authorized to make.

The officers of a town or county are distinct from and are not the town or county. Ordinarily they have such powers

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only as the law confers upon them, and they can bind their respective municipalities only when acting within the powers so conferred. The municipality is not estopped by the acts of its officers, unless such acts are directed to be done by the municipality, or are ratified by it after the same are done. It is clear that the counties or towns cannot be estopped by the acts of temporary officers appointed by the legislature for a special purpose; and if it is sought to charge such towns and counties for the acts of such officers, it would seem that they could be charged only when they had proceeded strictly according to law. Without deciding whether this defect in the proceedings would be an absolute bar to the plaintiff's recovery for the work done, against the towns in which the highway is located, or against the county, had the act charged the county with the payment for such labor, we make the above suggestions as bearing upon the question as to the liability of the towns to pay for the work done under the provisions of the general law, should the parties interested see fit to attempt to enforce the claim against the towns, instead of applying to the legislature for relief.

As a complete answer to the claim of the respondent in any aspect of the case, the learned counsel for the appellant insists that the whole act is unconstitutional and void.

That the legislature has the power to appoint commissioners to lay out and establish state roads can only be questioned on the ground that it is prohibited from so doing by some positive provision of the constitution. Unless the power is taken away, it is clearly a legislative power, and can be exercised by the legislature. The power has been exercised by the territorial legislature during the existence of the territory, and by almost every legislature since the formation of the state. By the amendment of the constitution made in 1871, the power of the legislature is clearly recognized by limiting its exercise to certain specified cases. The language of the amendment, so far as it relates to this question, is as follows: "The legisla-

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ture is prohibited from enacting any special or private law, . . . for laying out, opening or altering highways, except in cases of state roads extending into more than one county." This amendment of the constitution is a clear declaration that the power to pass acts for laying out, establishing and opening state roads is a legislative power; and that part of the amendment was adopted for the express purpose of restraining and limiting the power previously exercised by the legislature. In the case of *People v. Supervisors*, 20 Mich., 95, Justice CHRISTIANCY, in speaking of this power of the legislature over highways of every kind, says: "The legislative power is everywhere recognized as the proper guardian of all such public rights as the right of travel upon highways, as having, as the proper representative of the public, full power over the whole subject of laying out, opening, altering and discontinuing highways; and this power they may, so far as they have not been restrained by the constitution, exercise directly, without delegating it to any other tribunal." The same learned judge, in the case of *People v. Hurlbut*, 24 Mich., 62, repeats the same views, and expressly holds that the power to appoint commissioners to lay out and open highways is a legislative power, and, when not restrained by any other constitutional provision, is absolute upon that subject.

It is urged by the learned counsel, that, admitting that such is the rule, our constitution restrains the exercise of the power, and that its exercise is a violation of section 23, art. IV of the constitution, which provides that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." That the appointment of commissioners by the legislature to lay out and establish a state road which shall extend into two or more counties is not a violation of this provision of the constitution, is apparent from the fact that the laws respecting the government of towns and counties do not provide for laying out any roads extending from one county into another. Until the legislature

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shall so amend the laws regulating the government of towns and counties as to provide for the laying out of highways extending from one county into another, there is no system of town or county government to be violated by reason of the laying out and establishing such highways by commissioners appointed by the legislature.

It is urged that so much of chapter 223, Laws of 1875, as authorized the commissioners to open and construct the highway laid out, so as to make the same passable for the public, violated this uniformity. It cannot violate any provision of the laws governing counties, as there is no general law which authorizes any county to open any highway for public use in the first instance. The law only authorizes a county, at the option of the board of supervisors, to assume control *over the main traveled roads therein*. It was held by this court that a special act granting power to one county to aid in the construction of a railroad did not violate this rule of uniformity; and if it did not, it is difficult to see how an act which compels the county to aid in opening a highway in such county can be unconstitutional for that reason. *Single v. Supervisors*, 38 Wis., 361-372. If that part of said chapter which provides for the opening and construction of such road violates the provision of the constitution above referred to, it is because it violates the uniformity of the system of town government, which provides that all state as well as other highways shall be opened and worked the same as other highways, by the proper officers of the town where situated. Whether this act is subject to the constitutional objections made to the act appointing special commissioners to superintend the construction of the court house of the county of Milwaukee (*State ex rel. v. Supervisors of Milwaukee*, 25 Wis., 339), or to the objections made to the act which attempted to take from the control of the proper town officers of the towns of Chippewa county, the moneys raised by taxes in said towns for the purpose of building and repairing high-

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ways, and put them in the hands of the board of supervisors of the county for the purpose of expending the same, which was held a violation of the constitution in *McRae v. Hogan*, 39 Wis., 529; or whether it is to be controlled by the case of *State ex rel. v. Abert*, 32 Wis., 403, which holds that a law which authorized the board of supervisors of the county of Milwaukee to appoint one superintendent of the poor, when the general law applicable to all other counties required the appointment of three, does not violate the rule of uniformity, and is constitutional; or whether the whole subject of laying out and opening state roads is outside of the systems of town and county government, and the legislature may therefore provide for laying out and opening the same, without violating the uniformity of these systems — is, for the purposes of this case, unnecessary to decide.

The learned counsel for the appellant urges three other objections to the constitutionality of the act: *first*, that it violates the provisions of section 10, art. VIII, which prohibits the state from carrying on works of internal improvement; *second*, a general objection, that it infringes the rights of the counties by compelling them to pay for the construction of the road within their respective boundaries, without any assent on the part of such counties or their officers; *third*, that it violates the rule of uniformity in taxation, section 1, art. VIII. That this law does not engage the state in any work of internal improvement, is clearly demonstrated upon the face of it. It contains no authority for paying any of the cost of opening the highway out of the state treasury, and charges such cost, as we think, upon the counties and towns in which the same are situated: the cost of the laying out and establishing upon the counties, and that of opening and working the same upon the towns, if made chargeable to any municipality or body in the state. It is no more a work of internal improvement carried on by the state, because it directs the work to be done by officers specially appointed to do the

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particular work, than it would be were the same work directed to be done by the proper officers of some town or towns, county or counties.

This question, we think, was finally disposed of by this court in *Bushnell v. Beloit*, 10 Wis., 195, and has not been questioned since.

The second objection, that it infringes the rights of the counties by compelling them to pay for the expenses of laying out and opening the roads, is practically answered by our construction of the statute; that, as to the cost of opening and working the road, the counties are not charged; but were the counties charged with such expense, as well as the expenses of laying out and establishing the same, we see no objection to the validity of the act. The legislature must in all cases determine by law what locality or division of the state shall be burdened with the expenses of opening and repairing highways; and although, as a general rule, there is a discretion given to the officers of the municipality as to the amount of moneys which shall be expended for that purpose, and as to the manner of expending the same, still that discretion need not necessarily be conferred upon such officers, and generally the discretion as to the sums which shall be raised and expended for that purpose is limited by the legislature to an amount below or above which the local officers cannot lawfully act. The highway law governing highway taxes in towns makes it imperative that the officers shall levy a tax not less than one mill nor more than seven mills on the dollar of the valuation of the real and personal property in the towns; and this limitation upward is extended in several of the counties of the state. See section 1240, R. S. 1878. That the legislature has the power to compel taxation for the construction and improvement of roads and bridges, there can be no reasonable doubt. This power to compel the opening, construction and repair of roads and bridges, and the collection of taxes for that purpose, must reside in some department of the govern-

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ment; and we know of none in which, under the constitution, it can reside except in the legislature. There can be no doubt as to the power of the legislature to compel the several counties of the state, by general law, to open and work the state roads laid out and located within their respective boundaries; and unless there be some clause of the constitution which expressly prohibits it, the power to do so as to a particular road in a particular county is equally clear. The several city charters of the state contain provisions which charge the cost of opening and improving streets upon particular lots, or upon a particular district which is supposed to be especially benefited by such improvement; and these special provisions have always been upheld as a proper exercise of legislative power.

The municipalities of the state are not so independent of the state itself that no burden of taxation can be forced upon them by the legislature without their assent. It is held by this court that a municipality cannot be compelled to levy a tax for a purpose which is not a municipal purpose; but we know of no case where it has been held that a tax for a strictly municipal purpose may not be compelled by the legislature without the assent of such municipality.

In the case of *Mills v. Charleton*, 29 Wis., 416, Chief Justice DIXON, in delivering the opinion in that case, in which he denies the authority of the legislature to impose a tax upon a municipality without its consent, when such tax is not for a strictly municipal purpose, says: "But the case of taxation for a strictly public municipal purpose, as to defray the ordinary expenses of the municipal government, either in providing suitable roads and bridges, or for any other thing of acknowledged public necessity, depends, as we have seen, upon an entirely different principle. In the latter case, the power of the legislature, subject only to the constitutional rule of uniformity, when that rule applies, is most ample and unrestricted." See also *People v. Flagg*, 46 N. Y., 401. We do not think there would be any constitutional objection to the

law if it imposed upon the counties through which the road was opened the expense of opening the same.

As to the objection that the law, if it imposed the cost of constructing the road upon the counties through which it passed, would violate the rule as to the uniformity of taxation, we think it can have but little force. The fact that one county, town or city is burdened with a greater weight of taxation than another, is not a violation of the rule of uniformity. If it were, there would be no lawful tax levied in the state, as nearly every municipality raises a different amount of taxes upon the same amount of taxable property, the amount depending upon the necessities of the municipality or the will of its officers. If it be claimed that it would violate the rule of uniformity because other counties do not pay taxes for the opening of state roads, the rule of uniformity, if any, violated, would not be the uniformity of taxation, but of the system of county government.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded with directions to render judgment for the appellant.

COHN VS. THE WAUSAU BOOM COMPANY.

BOOMS IN NAVIGABLE RIVERS. (1) *Rights of riparian owner.* (2) *Power of legislature.* (3) *Quasi public franchises.* (4) *Form of action against corporation authorized to maintain boom.*

1. A riparian owner on navigable water, in this state (whether or not the owner of the soil under the water), may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water; but this right is subordinate to the public use of the water, and may be regulated or prohibited by law.
2. Ch. 45, P. & L. Laws of 1871, amended by ch. 256 of 1873, grants to defendant the exclusive right of constructing booms for holding, storing and assorting logs, etc., for a certain distance up and down the Wiscon-

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sin river; but, while it authorizes defendant's works in aid of the boom to extend, in the water, up and down the river, fronting its own lands and those of other riparian owners, excluding all other booms, within the limits specified, it does not attempt to authorize the use by defendant of *any part of the bank* of the river owned by others; and this could not be done for a private use, nor for a public use without just compensation.

3. The chief navigable value of the Wisconsin river being for the floating of logs to market, booms like that authorized by the statute being necessary for that use, and the statute giving an equal right in the use of defendant's works to all the world, defendant is held to be a *quasi* public corporation, and its franchises to be granted for a public use; and the prohibition of other riparian owners on the same river, within the specified limits, from constructing booms therein (a prohibition implied from the exclusive grant to defendant) is a valid exercise of the paramount public right.
4. If defendant's works have been so constructed as to impede the general navigation of the river, in violation of its franchise, a suit in equity by a private person (for an injunction, etc.) is not the proper remedy; and if defendant has so used its works in handling rafts or logs as to give a private right of action, the action must be at law, for damages.

APPEAL from the Circuit Court for *Outagamie* County.

The plaintiff, as owner of lot 6 in sec. 24, town 29 north, range 7 east, in Marathon county in this state, commenced this action in April, 1876, for the purpose of procuring to be removed, and abated as a nuisance, certain works constructed and maintained by defendant in the Wisconsin river, in front of said lot, under a claim of right founded upon ch. 45, P. & L. Laws of 1871, amended by ch. 256 of 1873. The complaint further demanded judgment that the defendant, its agents, etc., be perpetually enjoined from completing and maintaining said works in front of plaintiff's lot; that plaintiff recover of defendant a specified sum for damages caused by the construction and maintenance of the same; and for general relief.

The circuit court found the following facts: That plaintiff had been for several years prior to the commencement of the action, and still was, a lumberman, doing business upon the Wisconsin river and its tributaries, and as such owned and was interested in a large amount of pine timber lands upon

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that river and its tributaries; that he had been for several years, and still was, the owner in fee and in actual occupation of lot 6 described in the complaint, which lot has upon the east and south sides a frontage upon said river of 1918 feet; that the river opposite said lot, and for many miles above and below it, is a public highway, capable in its natural state of floating to market the products of the forest, and for many years has been and now is much used by the citizens of the state and others for the purpose of floating large quantities of logs, timber and lumber to the markets and mills adjacent to said stream; that directly in front of plaintiff's land the width of the river is about 500 feet, the average width of the main channel (in its natural state) about 90 feet, and the average distance from such main channel to the bank of plaintiff's land about 200 feet; that the general current of the river above and below said land is swift, but that in the natural state of said stream its waters in front of said land, between low-water mark and the thread of the stream, are sluggish and slack; that one of the necessary appurtenances to a saw-mill or lumber manufactory along the bank of said river or near said land, is a boom or pocket in which lumber may be rafted, and into which logs and lumber may be floated and there stored; that the waters of said river, in their natural state, in front of said land, are capable of being formed into such a pocket or boom; that said land contains sufficient area and frontage upon the river for the erection of two large saw-mills and their appurtenances, and, in the natural state of the river, the plaintiff, without obstructing its free use and navigation as a public highway, can construct and maintain, between low-water mark and the thread of the stream, a boom capable of storing at least 3,000,000 feet of logs; that said land was purchased by plaintiff as a saw-mill site, and with a view to constructing and maintaining, in front thereof, such a boom or pocket; that the land is valuable for the purposes just mentioned, but otherwise of little value; that at the time mentioned in the com-

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plaint, defendant constructed in front of plaintiff's land, along the whole length thereof, between low-water mark and the thread of the stream, a line of piers, booms and piles, at an average distance of about 85 feet from the bank, and about 115 or 120 feet from the main channel of the river in its natural state, and has ever since maintained and used the same for the storage of logs; that the piers were formed by driving into the bed or soil of the river numerous piles, united at the top by bands of iron, and kept in place by filling the piers with stones, the several piers being connected by booms; that defendant has run several lines of similar piers and booms across said river nearly at right angles to the line of piers and booms above described; that said system of piers and booms forms in front of said land a vast enclosure, and is constantly maintained and used by defendant for the storage of logs and timber; that ever since the construction of said works defendant has appropriated and blocked up the entire bed of the river in front of plaintiff's land and above and below the same, with piles, piers and booms, and has rendered it impassable and unnavigable, except a channel immediately in front of, and adjacent to, plaintiff's land, of an average width of about 85 or 90 feet, which is the only navigable portion of said river for a long distance above and below plaintiff's land; that by reason of the construction and maintenance of said works, the channel of the river has been shifted from its natural place, the current in front of said land greatly increased, and the water there, between low-water mark and said piers and booms, made to flow with great velocity, so as to form the main channel of the river; that, by reason of these facts, the approach to plaintiff's land has been rendered inaccessible for logs and lumber, all connection with the center of the stream cut off, and the fitness of the land for booming and mill purposes destroyed; that defendant has no legal or equitable title to the land between the meandered line and the middle of the river; that defendant might erect and maintain a system

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of piers and booms further up the river and nearer its east side, which would allow it to effect the purposes of its charter and not abridge plaintiff's riparian rights or the right of the public to navigate the stream; and that, by reason of the construction and maintenance of said piers and booms, plaintiff has suffered special damage.

Upon these facts, the judge held that the plaintiff was entitled to the specific relief demanded in the complaint, except that the damages allowed were merely nominal. Judgment was rendered in accordance with this decision. Defendant filed exceptions to the findings of fact and conclusions of law, and appealed from the judgment.

For the appellant, there was a brief by *Silverthorn & Hurley*, and oral argument by *Mr. Hurley*. They cited secs. 10, 11, 26 of defendant's charter (ch. 45, P. & L. Laws of 1871); and as to the validity of such legislation they cited *Pound v. Turck*, 5 Otto, 464. They further contended that while it is the settled doctrine of this state that the proprietor of lands on a river navigable or unnavigable, "in the absence of express limitation in his title," takes to the thread of the stream, it is equally well settled that he takes subject to the public right of navigation, and that, whether he owns the soil under the water or not, "the public has the right to improve, regulate and control the bed of the stream and the flow of the waters therein, in the interest of navigation and commerce." *Wis. R. I. Co. v. Lyons*, 30 Wis., 62; *Arimond v. G. B. & M. Canal Co.*, 31 id., 316; *Delaplaine v. Railway Co.*, 42 id., 225. See also *Boorman v. Sunnucks*, 42 Wis., 233; *Diedrich v. Railway Co.*, id., 248; *Stevens Point Boom Co. v. Reilly*, 44 id., 295; *Same v. Same*, 46 id., 237; *Jones v. Pettibone*, 2 id., 308. The state having the right to make the improvements in question, or to confer authority to do so on the defendant as its agent for the purpose, and defendant having executed the authority so conferred, "in a careful and discreet manner," equity will not decree the structures a nuis-

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ance and order them abated, especially at the suit of a private party. *Alexander v. Milwaukee*, 16 Wis., 247; *Lansing v. Smith*, 8 Cow., 146, and authorities there cited. The state, indeed, could not itself take plaintiff's property or directly damage it, nor authorize defendant to do so, without compensation; nor has it done so in this case. The riparian owner upon navigable water, whether or not he owns the soil to the center of the stream, has a right to construct wharves, piers, etc., in shoal water in front of his land, *only in case he is not "prohibited by local law"* (*Diedrich v. Railway Co.*, *supra*); but since the act of 1873 plaintiff has been prohibited by local law from constructing piers and booms in front of his land. The case is one in which "the subjection of the private right to the public use may impair the private right or defeat it altogether." *Stevens Point Boom Co. v. Reilly*, 46 Wis., 248. "Everyone who buys property on a navigable stream, purchases subject to the superior right of the commonwealth to regulate and improve it for the benefit of all the citizens." *McKeen v. Del. Div. Canal Co.*, 49 Pa. St., 424. As to the claim that defendant's works were a nuisance from which plaintiff had suffered special damage, counsel contended, among other things, 1. That, if they were constructed in a careful and discreet manner pursuant to the legislative grant of authority, they would be lawful even if a real impediment to navigation. *State of Pa. v. Wheeling Bridge Co.*, 18 How., U. S., 432; *Pound v. Turck*, *supra*, and authorities there cited; *Crittenden v. Wilson*, 5 Cow., 165; *Canal Com'rs v. The People*, 5 Wend., 423; *The People v. Railroad Co.*, 15 id., 113. 2. That as the court had found plaintiff entitled to only nominal damages, he could not have suffered any special injuries entitling him to maintain a suit for the abatement of the works, even if they were a common nuisance. *Lansing v. Smith*, 8 Cow., 146; *Carpenter v. Mann*, 17 Wis., 155; *Greene v. Nunnemacher*, 36 id., 51. 3. That a suit cannot be maintained in equity, in this state, by a private person, to

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abate an existing nuisance, because there is a complete and adequate remedy at law (sec. 1, ch. 144, R. S. 1858); and the objection, being founded on the exclusive jurisdiction of courts of law, need not be taken by answer. *Remington v. Foster*, 42 Wis., 608, and authorities there cited.

For the respondent, there was a brief by *Finch & Barber*, and oral argument by *Mr. Barber*:

1. As to the form of action. As riparian owner, plaintiff took to the center of the stream. *Olson v. Merrill*, 42 Wis., 210; *Delaplaine v. Railway Co.*, id., 215; *Boorman v. Sunnuchs*, id., 242; *Yates v. Judd*, 18 id., 118; *Arnold v. Elmore*, 18 id., 509, and cases there cited. Without authority of law, defendant appropriated to its own use land of the plaintiff constituting the bed of the river, and was constructing thereon permanent works which would produce continuous damage to the plaintiff, and tend to change the character of the property. Equity will assume jurisdiction, both because the remedy at law is inadequate, and in order to avoid multiplicity of actions. The complaint seeks not merely to procure a removal of the obstructions already in the river, but to prevent defendant from placing others there in the future; and no action at law can accomplish this. In cases of trespass upon land, where the act complained of has not been completed, equity has always interposed, especially when the damage is serious, tends to change the character of the property, and is continuous in its nature. *Kerr on Inj.*, *296, *331, and notes; *Martyr v. Lawrence*, 2 D., J. & S., 261; *Trustees, etc., v. Hoessli*, 13 Wis., 348; *Walker v. Shepardson*, 2 id., 384; *Potter v. Menasha*, 30 id., 492; *Corning v. Troy I. & N. Factory*, 40 N. Y., 206; *Middleton v. Flat Riv. Booming Co.*, 27 Mich., 534; 2 Story's Eq. Jur., §§ 901, 924, 927, and notes. This is especially the case when corporations enter upon the land of another without corporate authority; as the courts will keep them under control on grounds of public policy. *Kerr on Inj.*, *296, note f. The rights of the riparian owner

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are rights of *property* (*Walker v. Shepardson*, 4 Wis., 508; *Chapman v. Railroad Co.*, 33 id., 629; *Olson v. Merrill*, 42 id., 210); and the diversion of the flow of the river, causing special damage to plaintiff's land, is a nuisance which entitles him to a mandatory injunction to place him *in statu quo*. Angell on W. C., §§ 444-456; High on Inj., § 512; 2 Wood on Nuis., § 1130; *Earl v. De Hart*, 1 Beasley, 280; *Corning v. Troy I. & N. Factory*, 40 N. Y., 191; *Webb v. Portland Manuf'g Co.*, 3 Sum., 190; *Tyler v. Wilkinson*, 4 Mason, 400; *Townsend v. McDonald*, 2 Kern., 381; *Cotton v. Boom Co.*, 19 Minn., 497; *Rogers Loc. & Mach. Works v. Railway Co.*, 5 C. E. Green, 387; *Bemis v. Upham*, 13 Pick., 169. The judgment is as provided by statute (Tay. Stats., 1698, §§ 2, 6), all the facts being found by the court which were necessary to entitle plaintiff to the statutory relief. And even though it should be held that our action is wholly equitable, defendant, after answering, going to a trial, consenting to a reference, etc., cannot now be heard to object. *Peck v. School District*, 21 Wis., 517; *Tenney v. State Bank*, 20 id., 164.

2. As to defendant's rights under its charter. It does not follow that because defendant has the right to construct a boom, it has also the right to do everything necessary for that purpose. Its charter in its present form contains no eminent domain clause; no provision for ascertaining the damages sustained by property holders. It is a mere license from the state to use the river, subject to the rights of the property holders. If the company can obtain by purchase the title to the bed of the stream, the consent of the riparian owner to use the banks of the river, or to divert the flow of its water, the charter is its security that the public will not prosecute it for maintaining its works. "The legislature could grant the franchise or license as against the public only; it could not license a trespass by its grantee upon land to which he had no title." *Stevens Point Boom Co. v. Reilly*, 44 Wis., 303; *Lee v. Pembroke Iron Co.*, 2 Am., 60; *Perry v. Wilson*, 7

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Mass., 393; *Grand Rapids Booming Co. v. Jarvis*, 30 Mich., 323. 3. If the rights of the plaintiff have been violated, he is entitled to the relief sought, although the actual damage thus far suffered has been nominal. Wood on Nuis., §§ 774-6; *Rochdale Canal Co. v. King*, 21 Eng. Law & Eq., 177; *Olwes v. Waterworks Co.*, L. R., 8 Ch. App., 125; *Embrey v. Owen*, 6 Exch., 368; *Webber v. Gage*, 39 N. H., 182; *Bassett v. Manuf'g Company*, 47 id., 224; *Wright v. Moore*, 38 Ala., 593; *Phoenix Water Co. v. Fletcher*, 28 Cal., 483; *Holman v. Boiling Spring Co.*, 1 McCart. (14 N. J. Eq.), 335; *Cotton v. Rum River Boom Co.*, 19 Minn., 497; *Webb v. Portland Co.*, *Corning v. Troy I. & N. Co.*, and *Middleton v. Booming Co.*, *supra*.

RYAN, C. J. It is settled in this state that a riparian owner on navigable water may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water. This is properly a riparian right, resting on title to the bank, and not upon title to the soil under water. It is a private right, however, resting, in the absence of prohibition, upon a passive or implied license by the public; is subordinate to the public use, and may be regulated or prohibited by law. *Diedrich v. Railway Co.*, 42 Wis., 248; *Stevens Point Boom Co. v. Reilly*, 44 Wis., 295; *S. C.*, 46 Wis., 237.

It is not questioned that the respondent had this right in front of his land on the Wisconsin river, before the passage of chapter 45, P. & L. Laws of 1871, amended by chapter 256 of 1873. Section 10, however, of the former chapter, grants to the appellant the exclusive right of constructing booms necessary for holding, storing and assorting logs, etc., for a certain distance up and down the bank of the river, including the respondent's land fronting upon it.

Nothing in the section or elsewhere in these statutes, taken together, will bear a construction authorizing the use by the

appellant of any part of the bank of the river owned by others, or the exercise of the riparian right of others, within the limit defined. Of course, that could not be done for a private use; or for a public use, without just compensation, by the exercise of the right of eminent domain. Such a power was given in the statute of 1871, but it is expressly taken away by the statute of 1873. Under the two statutes, so far as the use of the bank of the river is essential to the exercise of the franchises granted to the appellant, it is confined to its own riparian ownership; and the exclusive right of the appellant as against other riparian owners is prohibitory only of the exercise of the right by the latter. In this respect the construction of the statutes is sufficiently plain. The appellant's boom can rest on the bank of the river only in right of the appellant's riparian ownership; but its works in aid of the boom may extend in the water, up and down the river, excluding all other booms within the limits specified.

The prohibition of the section is not express. It is only an incident of the exclusive grant. The validity of the prohibition is therefore dependent on the validity of the grant. A statute may, indeed, in the exercise of legislative discretion, take away the exercise of the private right, which is a *quasi* intrusion upon the public right, is subservient to it, and exists only by public sufferance. But this can be properly done only in the enforcement of the paramount public right; and a statute granting an exclusive right to one riparian owner, for a private use, could not be supported as a valid prohibition of the right of adjacent riparian owners. Such a provision would not be an assertion of the paramount public right, but the subordination of one private right to another; would not be in aid of public use, but of a *quasi* monopoly of private use. As between several riparian owners such a provision would have effect to give one owner's land somewhat of the nature of a dominant estate, and the lands of the others somewhat of the nature of servient estates. This could not be up-

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held as a valid exercise of legislative control over the private riparian right.

The controlling question in this case, therefore, is whether the franchises of the appellant are granted for a public or for a private use.

As they stood under chapter 45 of 1871, it would be difficult to consider the appellant other than a private corporation, for private use; for section 15 of that statute gives a preference to the members of the corporation over the general public, in the use of the works authorized. But the amendment of 1873 takes away the preference, and gives an equal right in the use of the works to all the world; and the question here must be determined under the latter provision.

In this state, navigable water includes all water capable of actual navigation (*Diedrich v. Railway Co.*, *supra*), and the capacity of floating logs to market is sufficient to make water navigable within the rule. *Olson v. Merrill*, 42 Wis., 203. Whether and how far navigable for other purposes, the capacity of floating logs to market appears to be the chief navigable value of the Wisconsin river, as the legislation relating to it and numerous cases in this court abundantly show. Whatever equally aids this use of the river by all having occasion for it, is of public purpose (*Wisconsin R. I. Co. v. Manson*, 43 Wis., 255); and the utility, indeed the necessity, of booms at convenient points for receiving, assorting and distributing logs, such as the appellant is authorized to construct, is so universal on such rivers that it is judicially recognized as entering into the law governing their use. *Pound v. Turck*, 95 U. S., 459. See also *Delaplaine v. Railway Co.*, 42 Wis., 214; *S. P. Boom Co. v. Reilly*, *supra*; *G. R. Booming Co. v. Jarvis*, 30 Mich., 308; *Perry v. Wilson*, 7 Mass., 393; *Lawler v. Boom Co.*, 56 Maine, 443.

The appellant must therefore be held to be a *quasi* public corporation (*Att'y Gen. v. Railroad Cos.*, 35 Wis., 425), an agent of the state for the improvement of the river (*Wis. R.*

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I. Co. v. Manson, supra), and its franchises granted for a public use.

Of course, private property of others could not be in any way appropriated or used by the appellant in aid of the public purpose, without authority of law, upon just compensation. But the land of the respondent is neither taken nor used; the works of the appellant neither touch it nor overflow it. The statutes under which the appellant acts authorize no such interference with the property of others. They only aid the public use for which the appellant is chartered, by restraining the exercise of a private right, which the legislature appears to have considered inconsistent with it; a right which the respondent, as other riparian owners, held only by implied public license—as it were, as tenant by sufferance of the state; a right of which the exercise might always be prohibited by public law, in aid of public use. The private right is a *quasi* intrusion upon the public right, tolerated only in private aid of navigation, and gives way, *ex necessitate rei*, to public measures in aid of navigation.

“This private right of the riparian owner is subordinate to the public use of a navigable river, and is always exercised at peril of obstructing navigation. This subjection of the private right to the public use may sometimes impair the private right or defeat it altogether. But the public right must always prevail over the private exercise of the private right.” *S. P. Boom Co. v. Reilly*, 46 Wis., 237. As against the riparian owners, within the limits specified in the statute, the state has only resumed its own. Otherwise, the title, possession and use of the respondent's land remain intact. If the public action lessen its value, it is literally *damnum absque injuria*. *Alexander v. Milwaukee*, 16 Wis., 247.¹

¹The authority of *Alexander v. Milwaukee* is not considered shaken by *Arimond v. G. B. & M. Canal Co.*, 31 Wis., 316. The cases are both well decided, on essentially different grounds, and, properly understood, quite consistent with each other.

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And this proceeding, to restrain the agent of the state in the exercise of franchises granted in public right for public use, is equivalent in principle to a private action against the state itself to subordinate the paramount public right to the subservient private right.

So far the appellant's works have been considered as complying with its franchises. It may be that they are so constructed as to impede the general navigation of the river. If so, the remedy is surely not by a proceeding in equity at the suit of a private person. It may be that the appellant has so used its works, in the handling of rafts or logs, as to give some right of action to the respondent. If so, the action is surely at law, sounding in damages. *Remington v. Foster*, 42 Wis., 608.

By the Court.—The judgment is reversed, and the cause remanded to the court below with directions to dismiss the complaint.

JOHNSON and another vs. THE ASHLAND LUMBER COMPANY.

DEED. (1) *Exceptions in deed construed and upheld.* (2) *EVIDENCE of nonexistence of deed.*

SPECIAL VERDICT: (3) *Insufficient to support judgment.*

1. In a deed of a quarter-section of land bounded only on the north by a town line, an exception of "the 32 acres mortgaged to A. adjoining the town line," must be *presumed*, in the absence of the mortgage, to be an exception of a parcel of land extending the whole length of the north side of the quarter-section, of sufficient uniform width to include 32 acres; and an exception of seven acres "to be taken on the east side of said described land," is an exception of a parcel of land extending along the whole east side of the quarter-section, of sufficient uniform width to include seven acres; and such exceptions are not void for uncertainty.
2. The record of a mortgage from the same grantor to A. of 34 acres of land in *another* quarter of the same section was produced on the trial, and no other mortgage from said grantor to A. was found of record. *Held*,

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that this was no proof of the nonexistence of an *unrecorded* mortgage corresponding to the description in said deed.

8. In an action for the conversion of timber alleged to have been cut from plaintiffs' lands, the special verdict was merely that the timber was cut by a stranger on a certain quarter-section of land, and by such stranger sold to and manufactured and disposed of by the defendant. The evidence was, that plaintiffs, at the time of such cutting, owned only a part of said quarter-section, and there was no finding that the timber was cut on *their* part, and no general verdict. *Held*, that there was nothing to support a judgment in their favor.

APPEAL from the Circuit Court for *Ashland* County.

Trover, for logs. On a former appeal in this action, it was held that the complaint states a cause of action. The complaint is sufficiently stated in the report on that appeal. 45 Wis., 119. The defendant answered a general denial.

On the trial, plaintiffs proved that the plaintiff *Lucretia Johnson* was sole heir, and the plaintiff *Elizabeth Blake* the widow, of Lawrence Farley, who died intestate; that the United States conveyed to one Stephen Butterfield lots 3 and 4, and the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 5, township 48, range 4 west; and that Butterfield conveyed to Farley a portion of such lands, described as follows: "Lots 3 and 4, and the north half of the northwest quarter of section No. 5, in township 48 north, of range 4 west, excepting the 32 acres mortgaged to Schuyler Goff, adjoining the town line, and also seven acres which I reserve for myself, and to be taken on the east side of said described land, leaving the amount of acres now deeded in this deed about thirty-four, more or less."

There was no general verdict. The jury found specially that one Ole Storman cut the logs in controversy on the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and lot 3 of said section 5, to the amount of 700,000 feet, board measure, and sold and delivered them to the defendant company; that the company sawed them into lumber, and sold and disposed of the same; that the timber standing was worth one dollar per thousand feet, board measure; and that the defendant has not paid the plaintiff therefor.

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Judgment was rendered for the plaintiffs on these findings, for \$700 and costs; and the defendant appealed therefrom.

For the appellant, there was a brief by *John H. Knight* and *W. M. Tomkins*, and oral argument by *Mr. Knight*. They contended, among other things, as follows: 1. That the land acquired by Farley by deed from Butterfield could be determined only by fixing the boundaries of the two tracts excepted in that deed; that the only evidence offered to locate the excepted premises was a mortgage to Goff, not shown to be the one referred to in the deed to Farley; that the court therefore could not say where the 34 acres conveyed to Farley were situated, nor could it be determined, from the evidence, how much of the timber in question was taken from that tract; and that, plaintiffs having failed to remove by proof the apparent ambiguity in the deed upon which they relied, that deed, so far as this action is concerned, should be held void. *Benedict v. Horner*, 13 Wis., 256; *Thomas v. Thomas*, 6 Durnf. & E., 671. 2. That the mortgage to Goff presumably established the metes and bounds of the 32 acres included in the first exception, "adjoining the town line," i. e., on the north side of the tract; and the seven-acre tract excepted is presumably a strip of uniform width along the east side of the lands described. *Dolan v. Trelevan*, 31 Wis., 147; *Jenkins v. Sharpf*, 27 id., 472; *Comm. v. Roxbury*, 9 Gray, 490; *Van Gordon v. Jackson*, 5 Johns., 440; 3 Washb. R. P., 398 et seq., and cases there cited. 3. That the title and right of possession to the lands described in the complaint were in one Storman by virtue of a certain tax deed, and he was in actual possession, and the lands were not redeemed by plaintiff from the tax sale until two years after the logs were sold by Storman to the defendant; that after the recording of a tax deed and before redemption, plaintiff had no estate in the property and could not even maintain an action to restrain waste (*Wright v. Wing*, 18 Wis., 45); that trees when severed from the realty become personal property (1 Washb. R. P., 142;

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Tyson v. McGuineas, 26 Wis., 656); that Storman, being in possession under a valid legal title to "an absolute estate in fee simple," was owner of the logs and rightfully in possession of them, and defendant, by purchase from him, acquired a good title; and that for this reason plaintiffs could not maintain the action. 1 Washb. R. P., 467; *Gordon v. Harper*, 7 Durnf. & E., 9; *Northrup v. Trask*, 39 Wis., 515, and cases there cited; *Cooper v. Davis*, 15 Conn., 556; *Case v. De Goes*, 3 Caines, 261; *Dewey v. Osborn*, 4 Cow., 329; *Fulton v. Fulton*, 48 Barb., 581; *Wickham v. Freeman*, 12 Johns., 183; *Peterson v. Clark*, 15 id., 205; *Stockwell v. Phelps*, 34 N. Y., 363; *Wilson v. Maltby*, 59 id., 126.

For the respondent, there was a brief by *J. J. Miles*, and oral argument by *G. W. Cate*. They contended, 1. That the exception of 32 acres in the deed to Farley was void for uncertainty; that the description of the land in such an exception should be as full and accurate as would be required in a deed of the same land (3 Washb. R. P., 3d ed., 369), and the limits of the land must be shown on the face of the instrument or by reference therein to some known object by which they may be ascertained (*Coats v. Taft*, 12 Wis., 389); that as to the 32 acres there was no reference in the deed to any object by which the limits could be established; and that the ambiguity was patent, and could not be helped by parol. 2 Phillips on Ev., C., H. & E.'s notes, p. 746, note 515; *Worthington v. Hyley*, 4 Mass., 205. 2. That the exception of the seven acres was also uncertain. (1) Because, by its terms, the tract might be taken on the east side of the 32 acres mortgaged to Goff, or on the east side of lot 3, or of lot 4, or of the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$. (2) Because, the language used implies a right in the grantor to select any seven acres he might choose on the east side of the lands. 3. That as the ambiguity was in the exception only, the exception was void, and the whole land passed by the deed to Farley. 4. That the exception of the 32 acres was in favor of no person, and that of the seven acres was to the grantor,

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without words of inheritance, and if it was valid he would only take a life estate (3 Washb. R. P., 371); and in that case Farley's heirs would own the fee subject to Butterfield's life estate, and could maintain action for timber cut upon the premises. 1 Washb. R. P., 139, 411; 1 Hilliard on Torts, 473; 2 id., 125, 149. 5. That the tax deed was void upon its face for various reasons; that Storman was never in possession of the land, except so far as was necessary to commit a trespass by cutting the timber; and that even if the deed was good, the title conferred by it was conditional, and the redemption rendered it void *ab initio*. R. S., sec. 1165; Blackwell on T. T., 4th ed., 475.

LYON, J. There is no finding that the plaintiffs are the owners of the lands from which the logs in controversy were taken. The judgment probably went upon the grounds that the exceptions in the conveyance by Butterfield to Farley are void for uncertainty, and that Farley took title under that conveyance to the whole of the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ and lot 3 of section 5, mentioned in the complaint. If Farley died seized of these lands, it is not denied that his title descended to the plaintiffs.

We think there is no uncertainty or ambiguity in the description in that conveyance of the excepted parcels. It was conceded in the argument of the cause, and the government plats show, that the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and lots 3 and 4 of section 5, constitute the northwest fractional quarter of that section — lot 3 being the southeast, and lot 4 the southwest fractional quarter of the quarter-section. The exception of 32 acres adjoining the town line, mortgaged to Schuyler Goff, must, in the absence of that mortgage, be presumed to be a parcel of land extending the whole length of the north side of the quarter-section (which is the only town line abutting it), of sufficient uniform width to include 32 acres; and the exception of seven acres to be taken on the east side of the fractional

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quarter-section is an exception of a parcel of land extending along the whole east side of the quarter-section, of sufficient uniform width to include seven acres. *Dolan v. Trelevan*, 31 Wis., 147; *Jenkins v. Sharpf*, 27 Wis., 472; *Walsh v. Ringer*, 2 Ohio, 435; 3 Washb. on Real Property (4th ed.), 406, and cases cited.

The record of a mortgage executed by Butterfield to Goff, on *thirty-four* acres of land in the *northeast* quarter of section 5, was read in evidence, and no other mortgage executed by the former to the latter was found of record. But that does not disprove the existence of the mortgage mentioned in the conveyance to Farley. It may have been executed and not recorded. Hence we are not called upon to decide the effect upon Farley's deed of proof that no such mortgage ever existed. If such a mortgage should be produced, and found to include lands not of a uniform width along the north line of the quarter-section, the presumption above mentioned would cease, and the description in the mortgage would control; that is to say, the exceptions would cover the parcel on the town line actually mortgaged, although the same might not be of uniform width. Hence, on the record before us, the most that the plaintiffs can successfully claim is, that when the logs were taken from the land described in the complaint (which is, in fact, the east fractional half of the northwest quarter of section 5), they were the owners of only a portion of such land. The special verdict fails to find that the logs were taken from that portion of the fractional half-quarter-section owned by the plaintiffs. The verdict may be true, and yet not a tree have been cut on the plaintiffs' land. Perhaps a general verdict for the plaintiffs would have supplied the omission, but no general verdict was returned. The omission to find that the timber was taken from the lands of the plaintiffs is necessarily fatal to the judgment.

2. A tax deed in the statutory form was read in evidence on behalf of the defendant, purporting to convey the lands described in the complaint (less seven acres) to one Smith; also a

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conveyance of the same lands executed by Smith to Storman. It was also proved that the plaintiff *Lucretia Johnson* was then a minor, and afterwards redeemed the lands from the tax sale and deed pursuant to the statute. Laws of 1868, ch. 89; R. S., 374, sec. 1166. Storman cut the timber and sold it to the defendant after Smith conveyed to him, and before such redemption.

Several questions are made on the tax deed and the effect of the redemption; but we have concluded to leave them undetermined on this appeal.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

THE SUPERVISORS OF LA POINTE VS. O'MALLEY and another.

COUNTY BOARDS. (1) *General rule as to their powers.* (2) *Their power in abolishing towns, etc.*

APPEAL TO SUPREME COURT: (3, 4) *From judgment against abolished town: by whom to be taken.*

1. Under sec. 22, art. IV of the state constitution (which empowers the legislature to confer upon boards of county supervisors "powers of a local legislative and administrative character"), it seems that when any subject of legislation is entrusted to county boards by general words in a statute, they acquire a right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them, and for that purpose have all the powers of the state legislature over that subject, unless the statute restricts the power or directs its exercise in a certain way.
2. Under sec. 670, R. S. (which empowers county boards "to set off, organize, vacate, and change the boundaries of the towns in their respective counties, subject to the limitations" afterwards prescribed), a county board has power to abolish an existing town, attach different parts of its territory to other existing towns, and provide that one of the latter shall succeed to the rights of the old town in specified property—in this case a judgment against third parties.

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3. After such an ordinance has taken effect, an appeal from a judgment so transferred cannot be taken in the name of the former town, or by its attorney, in the absence of any provision to that effect in the ordinance; but, though the action does not finally abate (sec. 2800, R. S.), the town to which the judgment has been transferred must be substituted as plaintiff before any further proceedings can be had; and an appeal taken in violation of this rule is dismissed as giving no jurisdiction to this court.
4. Sec. 2801, R. S., which provides that, in case of a transfer of interest, the action may be continued by the original party, etc., has no application to a case where the original sole plaintiff has ceased to exist.

APPEAL from the Circuit Court for *Ashland* County.

The respondents (defendants) moved to dismiss the appeal.

G. W. Cate, for the motion.

J. H. Knight and *W. F. Vilas*, *contra*.

TAYLOR, J. 1. We are of the opinion that the motion of the respondents to dismiss the appeal in this case must be granted.

The motion papers show that on the 21st day of June, 1879, the board of supervisors of the county of Ashland duly passed and published an ordinance by which the town of La Pointe was abolished, and the territory which had theretofore been included in and constituted said town was attached to and made a part of the towns of Butternut and Ashland. This ordinance, among other things, provided that as to the judgment recovered in this action the said town of Butternut should be the successor of the town of La Pointe. The appeal in this case was taken and perfected on the 26th day of June, 1879. The notice of appeal is entitled: "The Supervisors of the Town of La Pointe, Plaintiff, *vs.* John O'Malley and Samuel S. Vaughn, Defendants;" and is signed by "John H. Knight, Plaintiff's Attorney."

The only questions we deem it necessary to consider upon the motion are: 1. Is the ordinance vacating and abolishing the town of La Pointe a valid ordinance? and 2. If the ordinance is a valid ordinance, could this court acquire jurisdiction over the cause by an appeal taken from the order made

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in said action, in the name of the town of La Pointe, after such ordinance was passed?

We are of opinion that the ordinance was a valid ordinance, both for the purpose of vacating the town of La Pointe and also for the purpose of vesting in the town of Butternut the rights which the town of La Pointe had in the judgment in said action, and its rights in the other actions mentioned in said ordinance. Neither the counsel for the appellant nor those for the respondents question the validity of the ordinance so far as it undertakes to vacate and abolish the town of La Pointe; but the learned counsel for the respondents argues that the board of supervisors of the county had no authority to make any distribution of the property of the county, and that so much of the ordinance as undertakes to make the town of Butternut the successor of the town of La Pointe, as the owner of this judgment or of any other property of the town of La Pointe, is void. We do not think so. Section 22, article IV of the constitution, provides that "the legislature may confer upon the boards of supervisors of the several counties of the state such powers of a local legislative and administrative character as they shall from time to time prescribe." Under this provision of the constitution, the legislature has, among other things, conferred upon the boards of supervisors of the several counties the power, *first*, "to set off, organize, vacate and change the boundaries of the towns in their respective counties, subject to limitations hereinafter prescribed, designate and give names thereto, fix the time and place of holding the town meeting therein, and make all necessary orders for the preservation of the records and papers of any town which may be vacated." Subd. 1, sec. 670, R. S. 1878.

The limitations referred to in the part of the section above quoted do not in any way affect the ordinance in question. Section 672, R. S. 1878, provides that "whenever the county board shall form a new town from parts of a town or towns already organized, they shall, by their ordinance of division,

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determine what portion of the indebtedness of the old town or towns shall be chargeable to the respective portions so detached to form such new town; and such new town shall pay the proportion of such indebtedness so declared chargeable to such detached portions, at such times as the same shall become payable; and for that purpose the town board of such new town shall levy a tax upon all the taxable property of such portions thereof so chargeable therewith, and the county board, in fixing the proportion of indebtedness chargeable to the detached portion, shall divide such indebtedness *pro rata*, according to the last assessment rolls of such old town." The other legislative powers conferred upon the several county boards of supervisors are all conferred in the most general terms; thus: "3. To alter, vacate or discontinue territorial or state roads within their respective counties. 4. To allow bounties for the destruction of wolves, lynxes and wild cats in their respective counties. 5. To change the name of any town or village, or person resident in their respective counties. 6. To alter or vacate any city, town or village plat, or any part thereof, or any street or alley therein, surveyed and recorded in any such county, upon petition by the proprietor or proprietors of any such city, town or village, or any part thereof or lot therein, and upon such notice by such petitioner or petitioners as is required in vacating town, city or village plats in the circuit court; provided, that no city plat, or any part thereof, or any street or alley therein, shall be altered or vacated without the consent of the common council of such city."

It is insisted by the learned counsel for the respondents, that the county boards take no power to do anything under this provision of the constitution, and these grants of the legislature thereunder, except such as is expressly and in plain terms conferred upon them, and that the county boards do not by implication take any power incident to and necessary to carry out the powers granted; and he argues that this is especially so in the case of the vacation of a town, for the reason

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that the legislature has made an express direction that in such case the board "shall make all necessary orders for the preservation of the records of the vacated town." It is to be inferred that the legislature intended to prohibit the board from making any other order or orders in regard to the other property of such vacated town. We do not think this a just construction of the legislative grant of power, especially as such grant is a grant of power to legislate. Under the constitution and the grant of the legislature, the boards of supervisors of the several counties in the state become legislative bodies, having power to legislate upon such matters of a local nature as may be entrusted to them by the legislature. We are inclined to hold that when any subject of legislation is entrusted to said county boards, by general words, such boards acquire the right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them; and that, for the purpose of disposing of such subject, they have all the powers which the legislature itself would have over the same subject, unless the legislature, in conferring such power, has restricted the power of the boards, or directed that it should be done in a certain way. And section 672, R. S. 1878, above quoted, is a restriction of the power of the county boards over the subject of the manner in which the debts of a divided town shall be paid after such division; and it is not to be inferred, because the legislature has in this particular case restricted the power of the boards as to the debts of a divided town, that such boards have no power to regulate the payment of debts or the collection of the assets of the towns vacated or altered in any other case. The sixth grant of power above quoted clearly indicates that the legislature understood that, unless the power of the boards were restricted, they would have power to do any act necessary to carry into effect the general object of the grant. This construction, we think, was clearly indicated in the opinion of this court in the case of *State ex rel. Hawes v. Pierce*, 35 Wis., 93-99. In that case

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the late learned Chief Justice DIXON, in speaking of the effect of these ordinances passed by the county board, says: "The orders of the supervisors thus passed have all the force of positive law. They are in fact laws of the same character and effect as like acts passed by the legislature of the state, or as if the same acts had been so passed. As a public or general law, the order vacating the town could not be in force under the constitution until published; hence the publication required by the statute could not be dispensed with."

In the case of *Smith v. Levinus*, 8 N. Y., 472, which was an action involving the validity of an ordinance of a board of supervisors for the protection of oysters in the public waters of Queen's county, the court say: "The next objection is that the act of 1849 [the act which conferred the power to legislate upon the boards of supervisors] does not prescribe and limit the boards of supervisors, but expressly leaves the power incident to their legislation unlimited in relation to the particular subjects embraced in them. It is said that they may provide extreme and cruel penalties for a violation of their laws. It is a sufficient answer to the suggestion, that the people have found it both safe and expedient to give a pretty large discretion to the legislature, relying confidently upon the fact that the officers that the people select to make their laws will possess some prudence, have some sense of right in, be guided in some degree by their consciences in discharging their duty.

We conclude, therefore, that the ordinance was valid, both for the purpose of vacating the town of La Pointe, and for the purpose of transferring the title to the money due on the judgment in question to the town of Butternut. It follows that, at the time the appeal was taken in this case, there was no such town in existence as the town of La Pointe, and that the ownership of the judgment in question was vested in the town of Butternut.

2. Did this court acquire jurisdiction of the action by the appeal taken in the name and by the attorney of the town of

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La Pointe? We think this question must be answered in the negative. Had the board of supervisors, in the ordinance, expressly provided that the actions then pending in favor of or against the town of La Pointe might be prosecuted to final judgment in the name of such town, it is possible that, in the view we have taken of the powers of the board in matters of this kind, such direction would have warranted the continued prosecution of such actions in the name of the vacated town; but we are of the opinion that the county board has not made any such order in the ordinance, and this question must be determined upon the theory that the plaintiff town was absolutely vacated and out of existence at the time this appeal was taken, and the ownership of the judgment then entirely vested in the town of Butternut.

There being no longer any such corporation in existence when the appeal was taken, and the right of action having passed to another, we are clearly of the opinion that the action as it then stood had temporarily abated. The cause of action had not abated, but had been transferred to another; but the particular action in which it had been sought to enforce the cause of action had so far abated that, according to the decisions of this court, no step could be taken in such action, after such corporation had ceased to exist, in the further prosecution of the same, until the party to whom the cause of action had been transferred was substituted as the plaintiff therein.

This court held, in the case of *Downer v. Howard*, that where the respondent had died after an appeal had been perfected, no steps could be taken therein by either party, except such as were necessary to make the representatives of the deceased party parties to the proceedings in this court, until such representatives were in fact made parties to the action. And in the same case it was held that the cause of action in that case had not abated. It is the general rule applicable to all cases where the death of a sole party takes place during the pendency of an action, though the cause of action continues in

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favor of or against some one else, that nothing further can be done in the action until the person in whose favor or against whom the cause of action survives is brought before the court by some proper proceeding. *Moore v. Rand*, 1 Wis., 245; *Harteaux v. Eastman*, 6 Wis., 410; *Durbin v. Waldo*, 15 Wis., 352; *Stephens v. Magor*, 25 Wis., 533; *Tarbox v. French*, 27 Wis., 651.

In New York, where the law upon the subject of the abatement of actions when the cause of action survives, is the same as in this state, Waite, in his Practice, lays down the broad rule, that when a sole plaintiff dies pending the action, no further step can be taken in the action until a substitution of the proper representative of the deceased plaintiff has been effected; and in the case of *Reed v. Butler*, in the N. Y. Com. Pleas, 11 Abb., 128, it was held that when the plaintiff had moved to strike out the defendant's answer, and died between the hearing of the motion and the granting of the order by the court, the entry of the order striking out the answer, before an order had been obtained reviving the suit in the name of the proper party, was not only unauthorized but void.

Section 2800, R. S. 1878, does not change the law as it was before that revision. See first part of section 1, ch. 135, R. S. 1858. The meaning of section 1, ch. 135, R. S. 1858, and section 2800, R. S. 1878, is simply that, when the cause of action survives or continues in favor of some other person, the action shall not finally abate so that no further proceedings may be had in the same; but the whole statute, taken together, clearly shows that the action is temporarily abated until proceedings are taken to continue the same in the name of the proper representative of the deceased party.

We do not think this case comes within the provisions of section 2801, R. S. 1878. In order to bring a case within the provisions of that section, when the interest of the plaintiff has been transferred pending the litigation, such original plaintiff must still be *in esse*, after such transfer, in order to

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permit the proceedings to continue in his name, or in the joint names of such original plaintiff and the person to whom the cause of action has been transferred. The section has no application to the case of the death of a sole plaintiff, or to a case where the sole plaintiff has ceased to exist. *Andrews, Administratrix, v. Thayer*, 30 Wis., 228. In this case, the plaintiff having ceased to exist for any purpose previous to the taking of the appeal, and the right of action having been transferred to the town of Butternut, and continued to exist in the last-named town, the action did not, under section 2800, finally abate so that no further proceedings could be taken therein; but the right to proceed further in the name of the town which was no longer *in esse*, had abated; and until an application is made to substitute the party in whom the right of action continued, as plaintiff, no further proceedings can be had therein.

The action of the attorney of the town of La Pointe, therefore, in taking this appeal, was wholly unauthorized and void, and this court has acquired no jurisdiction of the case, and the appeal must be dismissed.

By the Court. — Appeal dismissed.

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PRESCRIPTION: (1) *Follows statute of limitations.* (2) *When rights acquired by, against the state.*

1. In this state *prescription* and *limitation* are substantially alike in their legal effects, both conferring title; and the period of prescription follows that of limitation fixed by statute.
2. A prescriptive right to flow lands by a mill-dam may be acquired by twenty years' uninterrupted user; and under sec. 26, ch. 198, R. S. 1853, where the twenty years had expired before the passage of ch. 105 of 1877, it conferred such prescriptive right even as against *the state*.

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APPEAL from the Circuit Court for *Jefferson* County.

The defendants appealed from an order sustaining a demurrer to the second and third defenses set up in their answer. The nature of the action and the character of those defenses will sufficiently appear from the opinion.

For the appellants, there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *D. S. Wegg*. They argued substantially as follows: 1. The law of England adopted in this country at the time of the revolution, fixed the limitation of actions for lands at twenty years as to subjects, and sixty years as to the sovereign power. 32 Henry VIII, c. 2; 21 James I, cc. 5, 16; 9 George III, c. 16. In New York, whence we derive our statute of limitations, 21 James I, c. 16, limiting such actions as to subjects to twenty years, was in substance reenacted; but in 1788 (1 R. L., 184, sec. 1), the period in which the sovereign power should be barred was reduced from sixty to forty years. In the revision of 1830 it was reduced to twenty years (R. S. of N. Y., 1830, vol. 2, title 2, sec. 1, p. 292); and this remained unchanged until 1849, when, by ch. 438 of that year, it was enlarged to forty years, and has since so remained in that state. In this state there was no change of the common-law period of sixty years until the revision of 1858, which took effect January 1, 1859. Ch. 138 of that revision was the statute of limitations both as to real and personal actions; and the 26th section declares that "the limitations prescribed in this chapter shall apply to actions brought in the name of the state or for its benefit, in the same manner as to actions by private parties." This rule continued unchanged until 1877, when said section 26 was amended by ch. 105 of that year, by adding the following words: "provided that this section shall not be so construed as to enable any person to obtain title to any lands, tenements or hereditaments belonging to or owned by the state, by adverse possession, prescription or user." Sec. 4229 of the present revision reads thus: "The limitations prescribed in this chapter shall apply

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to actions brought in the name of the state or for its benefit, in the same manner as to private parties; but no person can obtain title to real property belonging to the state, by adverse possession, prescription or user, unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years." The revisers in their notes to that section say: "Sec. 26, ch. 138, R. S. 1858, as amended by ch. 105 of 1877, and amended so as to make an adverse possession of forty years effectual against the state. This limitation has been adopted in other states, and it seems but just that the state should be barred of its right after so long an adverse claim." The sixty-year limitation was held by the English courts to bar the right of the king to file the information of intrusion (which was the form of action there in favor of the crown in such cases). Blackstone (3 Com., 307) says: "So that a possession for sixty years is now a bar even against the prerogative, in derogation of the ancient maxim, *nullum tempus occurrit regi*." That the statute of New York bars the right of recovery as against the state in forty years, is evident as well from the words of the act as from the decisions in that state. *The People v. Clarke*, 10 Barb., 155, and 9 N. Y., 366. (See also *Piper v. Richardson*, 9 Met., 157; *Nichols v. Boston*, 98 Mass., 39; *Tufts v. Charlestown*, 117 id., 401; *Cutter v. Cambridge*, 6 Allen, 20.) From the construction placed on the act of New York before its adoption here, which is binding upon this court (*Perkins v. Simonds*, 28 Wis., 90; *Wiesner v. Zaun*, 39 id., 205), it necessarily follows that if the state should bring ejectment, the defense of adverse possession would avail if twenty years adverse possession had occurred after January 1, 1859. Less than twenty years had intervened between that date and this action. The state, however, acquired title to these lands in 1857; the right of action then accrued; and more than twenty years elapsed between that time and this action. The period of sixty years established against the crown by act of parliament had

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become a part of the law of this state (*People v. Clarke, supra; Coburn v. Harvey*, 18 Wis., 147); and the said section 26 of the revision of 1858 merely abridged that period. But whether it be viewed in that light or as prescribing a limitation where none before existed, as a reasonable portion of the twenty years (*viz.*, seventeen years) remained after the passage of the act, the statute will be construed as taking effect, and the limitation begin to run from the time when the cause of action first accrued. *Parker v. Kane*, 4 Wis., 1; *Falkner v. Dorman*, 7 id., 388; *Von Baumbach v. Bade*, 9 id., 559; *Smith v. Packard*, 12 id., 371; *Howell v. Howell*, 15 id., 55; *Mecklem v. Blake*, 22 id., 495; *Hyde v. Kenosha Co.*, 43 id., 129.

If, then, this were an action of ejectment, the state would clearly be barred. Do not the same principles apply to the acquisition of an easement to flow lands by prescription? At common law, before the passage of any statutes of limitation against the crown, grants and charters from the crown, and even acts of parliament, were presumed after an enjoyment beyond legal memory, notwithstanding the maxim *nullum tempus occurrit regi*. 3 Bac. Ab., "EVIDENCE: Presumptive Proof," p. 619; *Crimes v. Smith*, 12 Rep., 4; *Bedle v. Beard*, id., 5; *Mayor, etc., v. Horner*, Cowp., 102; *Eldridge v. Knott*, id., 214; *Roe v. Ireland*, 11 East, 280; *Goodtitle v. Baldwin*, id., 488; *Delorme v. Church*, 20 L. J., N. S., Ch., 183; *Att'y Gen. v. Evelme Hospital*, 17 Beav., 366; *Johnson v. Barnes*, L. R., 7 C. P., 593; *Same v. Same*, L. R., 8 C. P., 527. This rule has been fully adopted in this country. 2 Whart. on Ev., § 1348; *Archer v. Saddler*, 2 Hen. & Mum., 370; *Hancks v. Tucker*, Taylor, 157, and 2 Hayw. (N. C.), 147; *Lessee of Allston v. Saunders*, 1 Bay (S. C.), 26. After the passage of acts of limitation, and early in the 18th century, the English courts adopted the rule of presuming grants where the use had existed for the time limited by the statute. After the lapse of that period, proof of the deed of an easement was dispensed with, and the deed was presumed to have been

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made at some anterior date, and lost by time or accident. "So that now an enjoyment of an easement for the term of twenty years raises a legal presumption that the right was originally acquired by title; and this though the jury should not find as a fact that any deed had ever been made, and although the user began in fact as an act of trespass." Washb. on Easem., 66. Prescriptive rights are now governed by the statute of limitations, the period of prescription varying with that of limitation. That the right to flow lands is an easement, and may be acquired by user for the period prescribed by the statute of limitations, is well settled in this state, at least as between private parties. *Rooker v. Perkins*, 14 Wis., 79; *Smith v. Russ*, 17 id., 227; *Waller v. McConnell*, 19 id., 417; *Ruehl v. Voight*, 28 id., 153; *Mead v. Hein*, id., 537; *Haag v. Delorme*, 30 id., 591; *Arimond v. G. B. & M. Canal Co.*, 31 id., 319; *Sabine v. Johnson*, 35 id., 198; *Aken v. Parfrey*, id., 250; *Arimond v. Canal Co.*, id., 46; *Cobb v. Smith*, 38 id., 21. We have found no case determining whether an easement may be acquired against the sovereign power in analogy to an act of limitations applying to that power. But if a subject may acquire the whole title as against the sovereign by adverse possession, why may he not acquire an easement within the same period of limitation? The greater includes the less. Moreover the statute declares that the limitations prescribed shall apply to actions brought in the name of the state or for its benefit, "*in the same manner as to actions by private parties.*" Now, since, as between private parties, the act limits the time as to easements, it can apply to the state in the same manner as to private parties only when so construed as to permit an easement to be acquired against the state. Again, the proviso added to sec. 26, ch. 138, R. S. 1858, by ch. 105 of 1877, declares that said section shall not be so construed as to enable any person to obtain title to any lands, tenements or *hereditaments* belonging to or owned by the state, by adverse possession, *prescription* or

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user. This shows a legislative understanding that under sec. 26, as it previously stood, "hereditaments" (which include everything corporeal or incorporeal, real, personal or mixed, Co. Litt., 6a) might be acquired as against the state by "prescription or user." This legislative construction is of almost controlling effect so far as the state is concerned. *Bonham's Case*, 8 Rep., 117; *Munger v. Lenroot*, 32 Wis., 541; *Winslow v. Urquhart*, 39 id., 266. The twenty years having elapsed before the passage of the act of 1877, the easement had become vested, and was not affected by that act. *Sprecher v. Wakeley*, 11 Wis., 432; *Hill v. Kricke*, id., 442; *Knob v. Cleveland*, 13 id., 245; *Howell v. Howell*, 15 id., 55; *Osborn v. Jaines*, 17 id., 573; *Pleasants v. Rohrer*, id., 577. The same legislative construction of said sec. 26 is also shown clearly by sec. 4229, R. S. 1878, and the revisers' note to that section, above quoted.

Again, although the sovereign power is not, as a general rule, included within statutes of limitations, still ch. 184, Laws of 1862, limiting actions for flowage to ten years, should be construed as applying to the state, because when the mill-dam act was passed, the legislature knew that large tracts of land would necessarily be flowed in the erection of mill-dams; it also knew that such lands were to a great extent flowed when the act of 1862 was passed; it also knew that the state, by sec. 26 above cited, had abandoned its prerogative rights as to the limit of actions; and yet, with full knowledge of these facts, it made no reservation of the lands or rights of the state in the act of 1862.

2. A large quantity of the lands involved in this controversy were sold by the state under certificates in 1857, but patents were not issued until from 1870 to 1872. It is the settled law of this state, that, although the fee remains in the state until the patent is issued, yet the holder of the certificate is the real owner as against all persons but the state. He is entitled to the rents and profits, may transmit title by descent

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or alienation, and may maintain actions against third persons, as if the absolute owner in fee. *Smith v. Mariner*, 5 Wis., 551, and Dixon's notes, p. 595; R. S., sec. 220, and revisers' notes; *Gunderson v. Cook*, 33 Wis., 551. Under such circumstances, a grant to flow the lands will be presumed as against the owner of the certificate and his assignee, the subsequent patentee. *Munshower v. Patton*, 10 S. & R., 334; *Hammer v. Hammer*, 39 Wis., 182.

3. The limitations in ch. 138, R. S. 1858, run against the state the same as a private person, and that act provides as to all actions concerning "real property." Real property is defined (sec. 13, ch. 5, R. S. 1858), as "coëxtensive with lands, tenements and hereditaments;" and this definition certainly includes easements.

For the respondent, there was a brief by *I. W. & G. W. Bird*, and oral argument by *G. W. Bird*:

1. As against the state no rights can be acquired by prescription. Angell on Lim., § 37; Angell on W. C., § 254, and notes; *Union Mill, etc., Co. v. Ferris*, 2 Sawyer, 176.

2. Statutes of limitation do not apply to the state unless it is expressly mentioned. Hence, in computing the ten years under ch. 184, Laws of 1862, no part of the time while the state owned the land is to be included. Angell on Lim., §§ 34-41; *Webber v. Harbor Comm'rs*, 18 Wall., 57; *Gibson v. Chouteau*, 13 id., 92; *Des Moines v. Harker*, 34 Iowa, 84, and authorities above cited. Sec. 26, ch. 138, R. S. 1858, applies to the state such limitations only as are prescribed in that chapter. But the limitation applicable here is that prescribed by the act of 1862. Moreover, sec. 26, while it made the limitations of the chapter in which it occurs, applicable to actions "brought in the name of the state or for its benefit," did not apply them to actions brought in the name of the grantee of the state who had taken his patent within the period of limitation. 22 Wis., 363. Again, by ch. 105 of 1877, the legislature specifically provided that the limitations

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set up in the answer should not apply to the state. Again, by ch. 550 of 1865, appearing as sec. 7, ch. 21 of 1871 (Tay. Stats., pp. 630, 677, §§ 56, 58 *a*), and continued as sec. 222, R. S. 1878, the patentee is authorized to maintain an action, for any trespass or injury committed upon the lands before his patent shall have been issued, "in the same manner and with the like effect, and he shall be entitled to like damages, as if such injury or trespass had been committed after the patent had issued." If the statute were to commence running before the issue of the patent, the patentee could not bring his action "in the same manner and with the like effect," etc., as here provided, because the running of the statute might bar the action. Moreover, this court has held in substance that the limitations pleaded do not apply to the state. *Waller v. McConnell*, 19 Wis., 417; *Zeidler v. Johnson*, 37 id., 335.

3. Neither statutory nor prescriptive time commenced to run against the holders of the certificates while the lands were held on certificates. The respective interests and mutual relations of the state and certificate-holder are fixed by statute. The fee of the land remains in the state until the patent issues. The certificate-holder is entitled to the possession, and may bring actions for certain rents, etc., and recover damages for injury to the land. He is prohibited from cutting down, destroying or carrying away any wood, timber or mineral. Upon forfeiture, the certificate is void, and the state resumes possession, and may sue the certificate-holder for waste or any unnecessary injury to the land. R. S. 1849, ch. 24, secs. 15, 18-21; Laws of 1856, ch. 125. The possession of the certificate-holder is therefore subordinate to the title of the state; in fact is the possession of the state. The relations of the two are analogous to those of landlord and tenant. Hilliard on Vendors, ch. 33, p. 97; *Wright v. Roberts*, 22 Wis., 161. Plaintiff's possession before the issuing of the patent was not adverse to the state. *Clements v. Anderson*, 46 Miss., 581; *Jackson v. Camp*, 1 Cow., 605; *Jackson v. Johnson*, 5 id., 74;

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Jackson v. Bard, 4 Johns., 203; *Woods v. Dille*, 11 Ohio, 455. If the statute did not run against the state, the mere transfer of its right to the possession would not set the statute in motion; and ch. 520 of 1865, with the acts before cited continuing it in force, indicate a clear intention to keep the statute from running while the lands were so held. The statute does not run while the state is jointly interested with another. *Glover v. Willson*, 6 Barr, 290. To set it running, the possession of the party claiming its benefit must be adverse, not merely to the owner's tenant, but to the owner in fee himself. Angell on Lim., §§ 33, 390. The use and enjoyment of what is claimed by prescription, must be of something which the party against whom it is claimed could have granted to the party claiming it. *Cobb v. Smith*, 38 Wis., 21; *Peterson v. McCullough*, 50 Ind., 35. Again, time does not begin to run against a party until he can bring the action claimed to be barred. Angell on Lim., §§ 42, 54-63; *Smith v. Russ*, 17 Wis., 227; *Jackson v. Schoonmaker*, 4 Johns., 390; *Jackson v. Sellick*, 8 id., 262; *Jackson v. Johnson*, 5 Cow., 74. The certificate-holder could not bring this action, because the statute required it to be brought by the owner of the land. Tay. Stats., ch. 56, secs. 4, 15-18; R. S., secs. 3377-86.

ORTON, J. This action is brought to recover damages to the lands of the plaintiff by being overflowed by the erection and maintenance of the mill-dam of the defendants below the same, on Bark river, in Jefferson county. The answer, after a general denial, sets up and alleges, as to a portion of the lands, that they had been so submerged, used and enjoyed adversely to the plaintiff for more than twenty years, a part of which time they were owned by the state as a part of the swamp-land grant; and as to the other lands, that they had been so submerged, used and enjoyed for more than twenty years, a part of which time they had been held under certificates of sale from the state.

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For the purpose of this decision, the question as to the rights of the purchaser under these mere certificates of sale is immaterial, and will not be considered.

The main and important question raised by the demurrer is, whether twenty years' prescription, by adverse possession and use of the lands for such purpose, when they belonged to the state for a portion of such time of prescription, is a defense to the action. In other words, is the state bound and barred, like any other party in such an action, by prescription as such?

Without discussing or following the history of the doctrine of prescription in England and in this country, as a general subject of inquiry, it may be said in brief: *First*. Prescription at common law was strictly applicable only to *incorporeal* hereditaments, while, as to the land itself, the period of adverse possession and enjoyment was fixed by the statute of limitations. *Second*. The analogy between prescription and limitation was so close and perfect that the period of prescription has now come to depend upon and follow that of limitation, very generally, in this country. *Third*. Prescription for the requisite period presupposed a deed having been given anterior to the time of prescription, and established a presumption of a grant as a *presumptio juris et de jure*; while limitation raised no such presumption, but operated merely as an extinguishment of the remedy. The former conferred and established a right and title, while the latter only barred a recovery. This was the former distinction, but which has long since been lost by the decisions in this and other states; and now adverse enjoyment for the period of limitation extinguishes not only the *remedy* but the *title* of the former owner, in lands as well as hereditaments. It is said by Chief Justice Dixon, in *Knox v. Cleveland*, 13 Wis., 246, "that the *right* or *title* of a party to property which is adversely held and claimed by another, is barred and out off by his neglect to prosecute within the period prescribed by the statute of limit-

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ations, and that such neglect operated to *divest* and *transfer* it to the adverse claimant;" and the same principle is recognized in *Sprecher and another v. Wakeley*, 11 Wis., 432; *Hill v. Kricke*, id., 442; *Brown v. Parker et al.*, 28 Wis., 21, and in many other cases in this court. *Fourth.* The analogies between prescription and limitation, in this state at least, not only establish the period of prescription and cause them to operate alike in conferring title, but make them so near alike in qualities, principle, purpose, effect and consequence, as to completely blend them together, and they are used interchangeably as being substantially the same. In *Smith and others v. Russ and others*, 17 Wis., 227, a case like the present, for flowing lands by means of a mill-dam, what is pleaded in the answer as *prescription*, as in this case, is called and treated as the *statute of limitations* in the opinion; and in *Haag v. Delorme and another*, 30 Wis., 591, a case of like flowage, Mr. Justice LYON says, in his opinion: "The nature, qualities and duration of the user and enjoyment of an easement, which will constitute a valid right thereto by prescription, are *precisely the same* as are required by the statute of limitations to enable the occupant of lands to defeat the title of the true owner;" and then holds that "the occupancy of the lands for such purpose must be *continued, uninterrupted and adverse*, for the length of time prescribed by the statute." This clearly implies that the statute of limitations applicable to real actions affecting the title of the lands, is equally applicable to an action like the present; and the language of the statute itself may well bear such an interpretation. The former statute in these respects is the same in the revision; and section 4206 provides that "civil actions can only be commenced within the periods prescribed in this chapter," clearly implying and comprehending *all* civil actions, including this action as well. Section 4208 provides that "no defense or counterclaim founded upon the title to *real property* or to *rents* and *services* out of the same, shall be effectual," etc.

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"Real property" is defined by the statute "to include lands, tenements and hereditaments, and all rights thereto and interests therein." This language is certainly broad enough to include the rights and interests in lands involved in this action, and, as we have seen, this court, in *Haag v. Delorme*, *supra*, and in other cases, has given such a construction to it.

The legislature, then, might very well adopt the same construction, and we think they have done so, in the legislation placing the state under the limitations of the statute as other parties, and by force of such construction making the state subject also to like prescription. It is provided in section 26, ch. 138, R. S. 1858: "The limitations prescribed in this chapter shall apply to actions brought in the name of the state, or for its benefit, in the same manner as to actions by private parties."

By section 1, ch. 105, Laws of 1877, the above section is amended as follows: "Provided, that this section shall not be so construed as to enable any person to obtain title to any lands, tenements or hereditaments belonging to or owned by the state, by adverse possession, *prescription*, or user." This amendment most clearly implies that before and without it the state was, equally with other parties, subject both to the statute of limitations and prescription, and that such an amendment was necessary to exempt the state from the consequences of prescription; and to that extent the above sections 4206 and 4208 would also be amended. The amendment of this section 26, found in the present revision as part of section 4229, has equal significance of this same construction: "But no person can obtain title to real property belonging to the state by adverse possession, prescription or user, unless such adverse possession, prescription or user shall have been continued uninterruptedly for more than forty years."

We conclude, then, that, under the effect of said section 26, ch. 138, R. S. 1858, the adverse possession and user of the lands in question, by means of the mill-dam, for more than

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twenty years, would be protected both by the statute of limitation and by prescription, and confer a title to the lands for such use upon the defendants, as against the state and other parties; and if such period had expired before the amendment of 1877, such title and right had become vested in the defendants.

This question involves only a construction of our own statutes, at most, and such a construction seems to have been established, in principle, by this court as well as by the legislature, and appears to be alike reasonable and just. No one doubts that the state, at any time within the period of prescription or limitation, might bring an action like any other party; and there is no reason why the presumption of a grant to the adverse claimant, from a delay to bring such action for over twenty years, should not prevail against the state as against other parties.

What may be the effect of the present statute as to prescription, or the former statute of limitations relating to real actions, upon the rights of the state, is not here to decide, but it may be that both are extended to forty years.

For other authorities bearing upon the subject see 3 Washburn on Real Property, 51; *Tyler v. Wilkinson*, 4 Mason, 402; *Lemon v. Hayden*, 13 Wis., 159; *Wyman v. The State*, 13 Wis., 663; *Rooker and another v. Perkins*, 14 Wis., 79. The court has been greatly aided in arriving at a proper decision of the important question in the case by the able and instructive arguments of the learned counsel on both sides.

By the Court.—The order sustaining the demurrer to the answer is reversed, and the cause remanded for further proceedings according to law.

Rounsavell vs. Wolf and another, imp.

ROUNSAVELL VS. WOLF and another, imp.

BOND: SURETIES: EVIDENCE. *What constitutes an affirmance by sureties of their liability as such.*

In an action on a bond, where the sureties defended on the ground that the instrument actually signed by them was essentially different from that which they promised to execute and believed themselves to be executing, it was error to admit evidence for the plaintiff that the principal obligor had turned over property to one of said defendants as security against the liability; the taking of such security not being an affirmance by the sureties of their liability on the bond in suit.

APPEAL from the Circuit Court for *Jefferson* County.

This action was brought against one Hollabush as principal, and *Wolf* and *Payne* as sureties, upon a bond. From a judgment against all the defendants, *Wolf* and *Payne* appealed.

Geo. W. Burchard, for appellants.

For the respondent, there was a brief by *I. W. & G. W. Bird*, and oral argument by *G. W. Bird*.

RYAN, C. J. The appellants claim, amongst other things, that they signed the bond in suit as sureties for their codefendant, as presented by the respondent's agent, without reading it, and that it is essentially different from the obligation which they had agreed to assume and believed that they were executing.

The court below admitted evidence, against their objection, that their principal turned out property to one of them as security against the liability. In every aspect of the case this evidence was inadmissible. The appellants had a right to take indemnity against the liability which they admit they had assumed, and indeed, against their possible liability on the bond as written; and the evidence was not only incompetent, but was well calculated to pass with the jury, as it was probably intended, for an affirmance by the appellants of the bond in suit, and a recognition of their liability upon it.

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The principal debtor makes no defense; and, if the appellants should be able to establish their defense, the respondent could have little difficulty in reaching the property turned out by his debtor to one of them.

By the Court. — The judgment is reversed, and the cause remanded to the court below for a new trial.

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EQUITY: FORFEITURES.

Equity will not entertain an action to reform a deed by inserting a condition subsequent, and to *declare a forfeiture* for breach of such condition.

APPEAL from the Circuit Court for *Rock* County.

In September, 1859, the plaintiffs executed and delivered to the *Evansville Seminary* (a corporation under the laws of this state) an absolute, unconditional deed, with full warranties, of a parcel of land in the village of Evansville, in Rock county, known as "Seminary Park," the consideration named in the deed being \$500. This action was brought in 1876 against the *Evansville Seminary* and the *Evansville Boot & Shoe Manufacturing Co.* The specific relief demanded in the complaint was, that the deed above described be reformed so as to express the intention of the parties, by inserting therein a provision that in case of nonuser of the land for a seminary it should revert to the grantors, their heirs and assigns; that a certain deed of said land, executed by the president and secretary of the board of trustees of the *Evansville Seminary* to the other defendant company, dated January 19, 1876, might be adjudged void; that the *Evansville Seminary* might be required to reconvey said land to the plaintiffs, as reversionary owners; that both defendants might be restrained

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from otherwise disposing of or interfering with said property; and that the *Evansville Seminary* might be adjudged dissolved by its own acts.

The charter of the *Evansville Seminary*, and its amendments, were put in evidence on the trial of the action. The original charter was granted in 1856. It empowered the corporation, among other things, "to acquire, hold and convey real estate and personal property;" and "to erect the necessary buildings, and conduct and continue, on the plat of ground marked and known as 'Seminary Park,' and such other grounds as said corporation may [might] acquire in the village of Evansville, . . . a seminary of high order for the education of youth of both sexes." It further provided that "all funds and property received by the board of trustees for seminary purposes, by gift or otherwise," should be "faithfully applied by them to the best of their judgment, for the benefit of the seminary, in the purchase or rent of grounds, the construction, purchase or rent of the necessary buildings, procuring library and apparatus, furniture and fixtures, creating endowments for the payment of professors and teachers, and in payment of the necessary expenses of the said corporation;" with a proviso, that "every donation or bequest made for particular purposes in accordance with the design of said corporation" should be applied "according to the wishes of the donor and the terms of the bequest." It also contained the following provision: "The library, apparatus, buildings, and lands not exceeding six acres, belonging to the said corporation, shall be exempt from taxation, provided that said lands shall not be used for any other than seminary purposes." None of these provisions appear to have been repealed or modified.

The circuit judge found the following facts: That at the time of the organization of the *Evansville Seminary* under the aforesaid act, the plaintiff *David L. Mills* was owner in fee of the land here in question; that, for the purpose of aid-

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ing said corporation, and to furnish it a site for the erection of buildings necessary for its objects, and solely as a gift or donation, said plaintiff gave to the corporation said land, and, by an instrument in writing by him executed and delivered, he agreed to convey the land to it upon condition that a seminary building should be erected thereon within two years from that time, the land to be conveyed for the purpose of a site for said seminary, and to revert to said *Mills* whenever it should cease to be used for that purpose; that a seminary building was erected on the said site within the time named, and thereupon a seminary of learning of the kind contemplated by the charter was established therein, under the charter, and continued until the spring of 1874; that on the 14th of September, 1859, plaintiffs conveyed said land to the seminary corporation in pursuance of the aforesaid agreement, without any consideration paid or agreed to be paid therefor, and solely for the purpose of donating the site to said corporation for seminary purposes; that the buildings erected on said site, and all other improvements thereon, were paid for with money donated to the corporation in aid of its general objects by a large number of persons residing in different parts of the country; that in the spring of 1874, said corporation wholly ceased to maintain a school in said building or use it for seminary purposes, and the use of the buildings and site for such purposes has been wholly abandoned since that time; that the conveyance to the *Boot & Shoe Manufacturing Co.* was made without the consent of plaintiffs and against the remonstrances of the plaintiff *David L. Mills*, and wholly without consideration paid or agreed to be paid therefor, in fraud of the rights of said plaintiff as donor, and "in utter violation of the duty with which the officers of said *Evansville Seminary* were clothed by law."

Upon these findings, the court held that the deed in question was void, and that plaintiffs were entitled to judgment declaring it void, and perpetually restraining the *Evansville*

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Seminary and its officers from selling or conveying any of the property except for seminary purposes.

The plaintiffs excepted to the failure of the court to find as a fact, that, in executing and delivering their deed to the seminary pursuant to the previous written contract, they did not intend to waive, and did not waive, their reversionary right to the premises in case the *Evansville Seminary* ceased to use them for seminary purposes. They also excepted to the failure of the court to hold as a conclusion of law, that the *Evansville Seminary* had forfeited its right to the premises and its right to the possession thereof, and that the same had reverted to the plaintiffs.

From a judgment in pursuance of the legal conclusions above stated, the plaintiffs appealed.

For the appellants, there was a brief by *John R. Bennett* and *John Winans*, and oral argument by *Mr. Bennett* and *David L. Mills*.¹ They contended, 1. That as plaintiffs' contract to donate and convey the "Seminary Park" to the *Evansville Seminary* was for the sole consideration and upon the express condition that the premises should be used only for seminary purposes and should revert when they should cease to be so used, these covenants and conditions in said contract did not merge in the deed executed by plaintiffs, and as between plaintiffs and the *Evansville Seminary* the agreement as to the reversion was still in force. *De Forest v. Holum*, 38 Wis., 516; *Morris v. Witcher*, 20 N. Y., 41, 47. The execution of a conveyance pursuant to an executory contract of sale does not extinguish the agreement on the part of the vendee. *Bogart v. Burkhalter*, 1, Denio, 125; *Johnson v. Hathorn*, 2 Keyes, 476. Even when the executory agreement is by parol, the vendee who accepts a conveyance in pursuance of

¹ Though the cause went off here upon a single ground, not specially dwelt upon in the argument at bar, yet it has been thought that an outline of that argument may be of value in cases which may hereafter arise in this state. —
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it is bound by its terms. 3 Keyes, 125; *Witbeck v. Waine*, 16 N. Y., 532; *Mayor, etc., v. Stuyvesant*, 17 id., 34; *S. C.*, 10 How. Pr., 76; *Mott v. Coddington*, 1 Rob., 267; *Atwood v. Norton*, 27 Barb., 638, 644; *Bennett v. Abrams*, 41 id., 619, 625. 2. That by wholly ceasing to use the "Seminary Park" and the buildings thereon for seminary purposes, and by conveying it to the other defendant, the *Evansville Seminary* forfeited all its right and title, legal or equitable, in and to the premises. And the cancellation of the deed to the other defendant did not revert the title in the *Evansville Seminary*. *Parker v. Kane*, 4 Wis., 1; *Wilke v. Wilke*, 28 id., 299; *Hilmert v. Christian*, 29 id., 104; *Horner v. Railway Co.*, 38 id., 165. A breach of a condition subsequent works a forfeiture of the estate. *Hayden v. Stoughton*, 5 Pick., 528; *Gray v. Blanchard*, 8 id., 284; *Austin v. Cambridgeport*, 21 id., 215; *Bowen v. Bowen*, 18 Conn., 535; *Warner v. Bennett*, 31 id., 468; *Stuyvesant v. New York*, 11 Paige, 414; *Nicoll v. Railroad Co.*, 12 N. Y., 121. 3. That, by the acts above named and others inconsistent with its corporate existence, the *Evansville Seminary* became and is dissolved. *A. & A. on Corp.*, § 74; 2 Kyd on Corp., 467, 516; *Sles v. Bloom*, 19 Johns., 456; *People v. President, etc.*, 38 Cal., 166; *Mickles v. Rochester City Bank*, 11 Paige, 118; *Hooker v. Utica Turnpike Co.*, 12 Wend., 371; *Bingham v. Weidervax*, 1 Coms., 509; *Dartmouth College v. Woodward*, 4 Wheat., 518; *Putnam v. Sweet*, 1 Chand., 286. 4. That as the *Evansville Seminary* was an eleemosynary corporation, and its board of trustees mere trustees of a charity, upon the dissolution of the corporation or a total failure to dispense the charity according to the designs of its founders and benefactors, and a total abandonment of the same, its real estate reverts to its grantors, their heirs and assigns. 1 Black. Com., 484; Kent's Com., 307; 2 Kyd on Corp., 516; *A. & A. on Corp.*, 10th ed., §§ 195-6, 778-9; Abbott's Dig. of Corp., 296; *Hooker v. Turnpike Co.* and *Bingham v. Weidervax*, *supra*;

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Waldo v. Railroad Co., 14 Wis., 575; *Dartmouth College v. Woodward* and *People v. President*, etc., *supra*.

For the respondents, there was a brief by *Cassoday & Carpenter*, and oral argument by *Mr. Cassoday*. They contended that there was no evidence to sustain a finding like that the omission of which was excepted to. As to the questions of law, they argued, among other things, 1. That courts of equity have no power to dissolve a corporation, unless authorized to do so by statute. *Folyer v. Ins. Co.*, 99 Mass., 267, 274; *B. M. Co. v. Langdon*, 24 Pick., 49, 52-3; *Att'y Gen. v. Ins. Co.*, 2 Johns. Ch., 371; *Howe v. Duell*, 43 Barb., 504; *People v. Railway Co.*, 36 How. Pr., 129; *Gilman v. Sugar Co.*, 4 Lans., 482. 2. That an individual donor to the *Evansville Seminary* could not maintain a suit in his own name to dissolve the corporation. (1) Even where a suit to dissolve a corporation will lie under secs. 3237-3245, R. S., it can only be brought in the manner there prescribed. (2) The statutory provisions referred to do not extend to any incorporated academy or select school. (3) Secs. 8-10, ch. 75, Tay. Stats. (being the same as ch. 54, R. S. 1849, referred to in the charter of the seminary), do not authorize this action. *State v. West Wis. Railway Co.*, 34 Wis., 197. (4) It is at least exceedingly doubtful whether a mere donor to an eleemosynary corporation can maintain any suit for any purpose. *Sanderson v. White*, 18 Pick., 328; *Dolan v. Mayor*, 4 Gill, 394. 3. That since the *Evansville Seminary* could not be dissolved by this action, the question of reversion did not arise. 4. That nothing was alleged or shown which would authorize a court of equity to reform the deed; and that, the deed not being reformed, it was wholly immaterial whether, prior to making it, plaintiffs did or did not propose to donate the lands upon condition or subject to the right of reversion; because all such prior propositions were superseded by the execution of the warranty deed actually made (46 Iowa, 287, 291; 27 Pa. St., 123, 131; 1 Rawle, 377, 384; 10 Johns., 297,

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299); and that the plea of no consideration was not available to defeat the deed, or to limit its language or lessen its effect. *Grout v. Townsend*, 2 Hill, 554, 557; *S. C.*, 2 Denio, 339, 340. 5. That even if the corporation should be dissolved by apt proceedings for that purpose, these lands, with the buildings and improvements put upon them with moneys donated by others, would not revert to the plaintiffs merely because the title to the lands once passed through them (*Nicoll v. Railway Co.*, 12 N. Y., 121, affirming *Same Case*, 12 Barb., 460, 465; *Owën v. Smith*, 31 Barb., 641; *People v. Mauran*, 5 Denio, 389, 398-401; *Heyward v. Mayor*, 7 N. Y., 314, 326; *Lowe v. Hyde*, 39 Wis., 345; Bingham on R. P., 179); but, in case of such a dissolution, if plaintiffs, as donors in part, had an equitable interest in the property, such interest would be subject to the closing up of the affairs of the seminary and payment of its debts, and then they would be entitled only to share *pro rata* with the other donors, whether of money or other property. *Niccolls v. Rugg*, 47 Ill., 47; *Ferraria v. Vasconcellas*, 23 id., 456.

Burr W. Jones, on the same side, argued the following among other points: 1. No dissolution of the corporation was shown. Plaintiffs' allegations and proofs as to the suspension of the ordinary and lawful business of the corporation were probably made with reference to sec. 20, ch. 148, R. S. 1858; but sec. 38 of that chapter expressly makes its provisions inapplicable to corporations of this class. In the absence of a statute conferring upon courts of chancery jurisdiction to adjudge the dissolution of corporations, the question whether or not the corporation has violated its charter or forfeited its franchise is for the sole determination of a court of law. Ch. 78, R. S. 1858, provides for closing up corporations whose charters have expired by their own limitation or shall be annulled by forfeiture or otherwise; but it does not provide any new method for dissolving corporations or determining a forfeiture of their charters. The proceedings for those pur-

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poses are provided by ch. 160, R. S. 1858, and by the long settled practice of the courts in the states from which our statutes are derived. "A cause of forfeiture cannot be taken advantage of or enforced against a corporation . . . in any other mode than by a direct proceeding for that purpose against the corporation, so that it may have an opportunity to answer. And the government creating the corporation can alone institute such a proceeding." A. & A. on Corp., § 777, and cases cited; id., § 734. A corporation may surrender its franchises; but an attempted surrender does not work a dissolution until accepted by the government. A. & A. on Corp., § 772. In further support of the foregoing views, counsel cited *Folger v. Ins. Co.*, 99 Mass., 284; 2 Potter on Corp., §§ 687-9, 696, 704, 712, and cases there cited; 2 Kent's Com., 305, 313, 314; *Regents, etc., v. Williams*, 9 Gill & J., 365-426; *Verplanck v. Ins. Co.*, 1 Edwards, 84; *Ferris v. Strong*, 3 id., 127; *People v. Trustees, etc.*, 5 Wend., 211; 2 Burr., 869; 2 Durnf. & E., 569. 2. Even if the corporation should be dissolved, the property claimed would not revert to the plaintiffs, whatever the common-law rule on that subject may once have been. *Strong v. Doty*, 32 Wis., 381; *Heaston v. Comm'rs*, 20 Ind., 398; *Seebold v. Shitler*, 34 Pa. St., 135; *Towar v. Hale*, 46 Barb., 361; *Sanderson v. White*, 18 Pick., 328; 2 Potter on Corp., § 699. Counsel contended that this would be so irrespective of any statute, because the courts have treated the former rule as inapplicable to the nature of our institutions; but he also relied upon the following statutes: R. S. 1878, sec. 2036; sec. 12, ch. 83, R. S. 1858; ch. 54, R. S. 1849, corresponding to ch. 78, R. S. 1858, made specifically applicable to the *Evansville Seminary* by its charter. See *State v. West Wis. Railway Co.*, 34 Wis., 194, construing secs. 8-10 of that chapter. It is claimed that in corporations of this class there are no stockholders; but the tendency of legislation in this state has been in a different direction. R. S. 1858, p. 486; R. S. 1878, sec. 1784. And it is a far more reasonable and equi-

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table doctrine, that all who subscribed and paid for the erection of a seminary should have an interest in the common property when the corporation may be dissolved, than that plaintiffs shall become the sole owners.

COLE, J. The claim of the appellants is, that the deed of September 14, 1859, was a grant upon condition, having been executed in pursuance of and under the previous executory contract to convey a site for a seminary; that the deed was voluntary, no consideration being paid or agreed to be paid for the land conveyed; and that the deed was executed solely for the purpose of furnishing a site for a seminary, with the express understanding of the parties thereto that when the land should cease to be used for seminary purposes the title should revert to the grantors. But no such condition is expressed in the deed, which is absolute in terms, and purports to convey an indefeasible estate. Now the object of this action is to have the deed reformed so as to make it express the actual intention and understanding of the parties, and, inasmuch as the land has ceased to be used for a seminary, to have the court declare and enforce the forfeiture. This, in substance, is the nature of the relief asked in the complaint; and the question, therefore, to be considered at the outset is: Will a court of equity exert its jurisdiction for such a purpose? It is well settled that it will not. The cases of *Clark v. Drake*, 3 Pin., 228, and *Lowe v. Hyde*, 39 Wis., 345, are direct decisions of our own supreme court upon this point. In the former case, the bill was filed for the purpose of aiding or enforcing a forfeiture, and, on demurrer, Judge WHITTON, in delivering the opinion of the court, said: "It is too well settled to be at all controverted, that courts of equity will not take jurisdiction of a case for the purpose of enforcing a forfeiture, but will leave a party who seeks to take advantage of one, to his remedy at law." p. 233. In *Lowe v. Hyde* the same doctrine is announced and enforced. In that case the chief justice says:

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"The complaint purports to be against Mr. Lawrence, the grantee of the respondent, the university, and the appellant, in equity, for reformation of the condition subsequent in the respondent's deed, for forfeiture for condition broken, and for possession. Aside from the statute of limitations, a proceeding in equity to enforce a forfeiture cannot be sustained." The plaintiff in that case abandoned his equitable proceeding; the cause was argued by counsel at the bar as an action of ejectment for forfeiture for breach of the condition stated in the deed; and, upon stipulation, was considered and decided by the court as an action at law. But had the action been treated as one in equity, the difficulty first suggested by the chief justice would have been insurmountable.

The objection seems equally decisive here. It is true, it was sought to prove by parol that the appellants, in executing the deed absolute in form, did not intend to waive or abandon the condition on which the land was conveyed. But still we are unable to perceive how this fact could aid the jurisdiction of a court of equity in the matter; for, if it was competent to prove by parol that the absolute grant was qualified by the condition contained in the executory agreement, this proof could be made as well in a court of law as equity. In either forum the question, of course, would be, whether it could be shown by parol that the conditions in the previous contract were intended to be imported into the deed or coëxisted with it. If, as is claimed by the appellants, these conditions did not merge in the deed, but remained in force after the conveyance was executed, and these facts could be established by parol testimony, then it is very plain that the appellants had an ample remedy at law to recover the possession of the property as for forfeiture upon subsequent condition broken. *Horner v. The C., M. & St. P. Railway Co.*, 38 Wis., 165. But equity will not enforce the forfeiture.

On the trial, the court below found, from the evidence, that the seminary corporation had ceased to use the property for a

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seminary, and had wholly abandoned it for that purpose, and had conveyed the property to the defendant the *Evansville Boot & Shoe Manufacturing Company*. This latter conveyance the circuit court set aside as void, and perpetually enjoined the *Evansville Seminary* from conveying away the property except for seminary purposes. This is as far as the judgment proceeded. Now the plaintiffs have appealed from so much of the judgment as grants the injunction, and which fails to adjudge that the seminary corporation had forfeited its right and title to the property, and that the title had reverted to them, and that they were entitled to the possession thereof. It is insisted that the court should, upon the case made or facts proposed to be shown, have adjudged the title of the property in the plaintiffs. But to grant this relief, the court would have had to enforce the forfeiture. For the reasons already stated, this it could not do. Indeed, in the view we have taken of the case, the whole judgment is indefensible, and would have to be reversed had it been appealed from. But we can only reverse so much of it as is before us for review, and remit the cause for such further proceedings as the parties may be advised to take.

It is apparent that the whole judgment proceeds upon the ground that the action is one to enforce the trust. But this is not the purpose and scope of the suit. Whether the appellants, as donors of the *Evansville Seminary*, could maintain an action for the execution of the trust, and to annul the conveyance made by the seminary corporation to the *Boot & Shoe Manufacturing Company*, is a question not involved in this case, and of course not considered. All that it is necessary and proper to decide on this appeal is, that it would be a violation of the principles upon which courts of equity proceed, to grant the relief asked in the complaint, and to adjudge that in consequence of the wrongful acts of the seminary corporation, which are disclosed in the evidence — its failure to use the property for seminary purposes and its attempt to con-

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vey it away, — its title in the property was forfeited, and such title, with the right of possession, had reverted to the grantors.

It follows from these views, that that part of the judgment of the circuit court appealed from must be reversed, and the cause remanded for further proceedings according to law.

By the Court. — So ordered.

TAYLOR vs. THE PHOENIX INSURANCE COMPANY OF HARTFORD.

INSURANCE AGAINST FIRE. *Oral agreements with agent. What constitutes a new contract of insurance, or a waiver of conditions.*

After a policy of insurance against fire had expired, the assured spoke with the agent of the insurer, stated that he was going away, to be gone a week or ten days, and wanted to renew the insurance before he left; to which the agent answered, "All right." The assured then asked, "Won't you do it for two per cent?" being a reduction on the rate previously charged; and the agent said he would. The assured asked, whether there was anything else the agent wanted him to do; and the latter answered, "No, nothing else; I have the description in the office, and will attend to it." The assured said further that he wanted "to renew the old policy, the same as it was before, in the same company, to the same amount;" and the agent answered, "All right." The assured went away the same day, returning in about ten days; and the property was destroyed by fire the next day after his return. There is no other proof of a renewal of the policy or the issue of a new one; the new premium was not paid; and the old policy contained a condition that it should be void if the premium remained unpaid, and that the insurance might be renewed provided the premium therefor should be paid, etc. *Held*, that the facts stated do not show a new contract of insurance *in presenti*, or a waiver of the conditions of the policy.

TAYLOR, J., dissents.

APPEAL from the Circuit Court for Rock County.

Action upon a policy of insurance against fire issued by the defendant company to the plaintiff. The original policy had expired before the loss, but the plaintiff alleges that it had been renewed by an oral contract between himself and the

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company (through its agent), and was in force when the property was destroyed. The policy contained a condition that it should be void if the premium remained unpaid; also a provision that the insurance might be renewed for any agreed time, "provided the premium therefor is paid," and indorsed on the policy or receipted for.

Whether the policy was renewed, was the question litigated on the trial. No question is raised on the pleadings, and it is unnecessary to state them. The evidence is sufficiently stated in the opinion. Plaintiff appealed from a compulsory judgment of nonsuit.

For the appellant, there was a brief by *Cassoday & Carpenter*, and oral argument by *Mr. Cassoday*.

For the respondent, there was a brief by *Bennett & Sale*, and oral argument by *Mr. Bennett*.

LYON, J. It may be assumed, for the purposes of the case, that Mr. Towne, the agent of the defendant insurance company, had authority to waive any adverse conditions in the policy, and to bind the company by an oral contract to renew it.

The proof of the alleged contract of insurance is all contained in the following testimony of the plaintiff. After testifying to a conversation with Mr. Towne before the policy expired, concerning its renewal, he proceeded as follows:

"Afterward, and on the 18th day of June, I had a conversation with Towne about renewing the policy. I met Towne in front of the post-office, and said to him: 'I want to renew that insurance of mine; I am going away to be gone a week or ten days, and I want it done before I leave.' He said: 'All right.' I then said: 'Mr. Hopkins offers to insure my property at 2 per cent., and you charged me 2½ last year; I don't want it in those local companies; I would rather have it in the same company, and have it renewed; won't you do it at 2 per cent.?' He answered: 'I will.' I said again: 'I am going to leave

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for Palmyra and Brodhead, and to be gone a week or ten days; is there anything else you want me to do?' 'No, nothing else; I have the description in the office, and will attend to it.' I said to renew the old insurance policy the same as it was before, in the same company, and the same amount; and he said: 'All right.' I went away that day, and returned again in about ten days, on the day before the fire."

We fail to find in the above testimony satisfactory evidence of a renewal of the policy *in presenti*. The purport of all the conversation on the subject between the plaintiff and Mr. Towne was, that the policy should be renewed thereafter; not that it was then renewed. The plaintiff said to the agent that he wanted it renewed, and desired that it should be renewed before he left home. The agent assented. They then agreed upon the premium to be paid therefor. The agent said that there was nothing more for the plaintiff to do, but that he (the agent) had the description of the property to be insured in his office, and promised to attend to the matter of the renewal. The plaintiff then directed the agent to renew the old policy the same as it was before—in the same company and for the same amount,—and the agent promised to do so. That is all there is of the alleged parol contract of renewal. It seems to us that the whole conversation pointed unmistakably to some further act to be done to renew the policy—to a renewal *in futuro*. Else, why the talk about the agent having the description in his office, and his promise to attend to the business? And why the closing direction to the agent to renew the old policy in the same company and for the same amount? If the policy was then and there renewed, the description ceased to be material, and the promise was superfluous, as was also the final direction to the agent to renew. Indeed, both the promise and direction tend strongly to prove, if they do not prove conclusively, that neither of the parties intended a contract of renewal *in presenti*, or supposed they had made any contract other than an executory oral contract

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that the company should renew the policy, and the plaintiff should pay the premium at some early future time. There is no evidence whatever inconsistent with the hypothesis that the agent was to make a certificate of renewal, and the plaintiff was to pay the premium, as conditions precedent to the renewal; or to show that the parties intended a contract out of the usual course of the business of insurance.

It is our duty to construe the alleged parol contract as established by the proofs; and we are constrained to hold that it is not a contract of insurance *in presenti*, and contains no waiver of the conditions contained in the policy sought to be renewed.

The cases cited by the learned counsel for the plaintiff to sustain the alleged oral contract as a valid contract of insurance, have all been examined. Some of them go upon the custom or usage of the business, and all of them were necessarily decided upon their own peculiar facts. An extended consideration of them will serve no useful purpose. It is believed that none of them are in conflict with the views above expressed.

It follows that the plaintiff was properly nonsuited, and that the judgment of the circuit court must be affirmed.

TAYLOR, J. This is an action by the plaintiff to recover for the loss of a building by fire, which he alleges the defendant had, through its authorized agent, insured, or agreed to insure, by an oral agreement a few days before the loss occurred.

The evidence shows that the property destroyed by the fire, and another building owned by him, had been insured by the defendant, through the same agent, the year previous, and the policy issued on such insurance had expired May 26, 1878; that a short time before the policy expired, the agent asked the plaintiff whether he would renew the policy for another year, and the plaintiff said he would wait a short time and see, and would see him again if he wanted it insured; and that on the

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18th day of June, 1878, after such policy expired, the plaintiff met the agent and had a conversation with him about renewing the policy.

The conversation, as sworn to by the plaintiff, was as follows: Plaintiff said to the agent: "I want to renew that insurance of mine. I am going away, to be gone a week or ten days, and I want it done before I leave." He said: "All right." Plaintiff then said: "Mr. Hopkins offers to insure my property for 2 per cent., and you charged me $2\frac{1}{2}$ last year; I don't want it in those local companies; I would rather have it in the same company, and have it renewed; won't you do it at 2 per cent?" He answered: "I will." Plaintiff said again: "I am going to leave for Palmyra and Brodhead, and to be gone a week or ten days; is there anything else you want me to do?" The agent replied: "No, nothing else. I have the description in the office, and will attend to it." "I said: 'Renew the old insurance policy the same as it was before, in the same company, and in the same amount.' He said: 'All right.' I went away that day and returned again in about ten days, on the day before the fire." Leonard Brimmer, a witness sworn on the part of the plaintiff, testified that "he heard the plaintiff tell Towne, the agent, that he wanted his insurance renewed for another year upon his warehouse. Towne said it was all right — he would attend to it; and plaintiff said that Hopkins offered to insure it for 2 per cent., but he thought he did not want to change it out of the same company; that he would like to have it in the same company. Towne said it was all right — he would attend to it. Plaintiff said he had to go away, and he wanted it attended to; and Towne said it was all right — he would attend to it."

R. R. Brown, a witness for the plaintiff, testified that he paid the premium on the former policy to the agent Towne; paid it by the request of the plaintiff; paid it on the third day of June, 1877, and the policy was delivered to him. This policy was dated May 26, 1877, and insured the property for

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one year from the 26th of May, 1877, to the 26th of May, 1878. The property claimed to be insured was burned June 28, 1878. Notice and proofs of loss were properly made after the fire; but plaintiff did not pay the premium, or offer to pay it.

The court below, on the motion of the counsel for the defendant, ordered that the plaintiff be nonsuited, and plaintiff excepted. Judgment was entered against the plaintiff, and he appeals to this court.

The policy which the plaintiff claims was, or was to be, renewed for another year, by his agreement with the defendant's agent, contained, amongst other things, the following clauses: "This insurance may be continued for such further time as shall be agreed upon, provided the premium therefor is paid and indorsed on this policy, or a receipt given for the same; and it shall be considered as continued under the original representation," etc.; "and if the premium shall be unpaid, the policy shall be void."

It is insisted by the learned counsel for the respondent, that no valid contract of or for insurance could be made by the respondent's agent unless the premium therefor was first paid by the insured, and that the agent could not bind the company by any waiver of the payment of such premium; or, if this was too broadly stated, that the plaintiff could not recover unless the premium was paid, or there was express proof that the agent agreed to trust the insured for the premium, and that the evidence does not show that the plaintiff promised to pay the premium, or that the agent agreed to trust him for the payment thereof.

I do not understand the learned counsel for the respondent as contending that the conversation between the plaintiff and the agent of the respondent did not amount to an agreement on the part of the agent to insure the property of the plaintiff presently, but that such agreement to insure was void in law, either, *first*, because there was no express agreement on the

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part of the plaintiff to pay the premium at any particular time, and no express agreement on the part of the agent to trust the plaintiff for such premium; or, *second*, because by the terms of the policy the agent had no power to waive the payment of the premium, and by its terms the policy was void unless the premium was in fact paid, or a receipt given therefor.

If the nonsuit had been granted upon the ground that the proof did not show a present insurance by parol of the property destroyed, I am inclined to think there would have been great force in that position. The policy which was sought to be renewed, contains a provision that it shall be renewed only when the premium is paid and indorsed upon the policy, or a receipt given for the same. It may well be said that as the policy itself in the hands of the insured notifies him that it can only be renewed in a certain way, he must see to it that it is renewed in the way therein marked out, otherwise it will be void. But all writers upon insurance make a distinction between an agreement to insure and an actual insurance; and it is held that even those companies whose charters provide that all policies of insurance issued by them must be in writing, may yet bind themselves by a parol contract to insure; that as every contract of insurance must be preceded by a preliminary contract to insure, involving an agreement between the parties as to the terms upon which the insurance shall be granted, such preliminary contract binds the company; and, if it afterwards refuses to issue the policy, the party seeking the insurance may compel the insurer to issue the same according to the terms of such preliminary contract; or, if a loss occur before the policy is issued, he may sue upon the contract and recover as damages the same sum he would have been entitled to recover had the policy in fact been issued in pursuance of such contract. *Rockwell v. Ins. Co.*, 4 Abb. Pr., 179; *Perkins v. Ins. Co.*, 4 Cow., 666; *Angel v. Ins. Co.*, 59 N. Y., 171; *Lightbody v. Ins. Co.*, 23 Wend., 25.

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The case of *Kelley v. Ins. Co.*, 10 Bosw., 82, was a case very much like the one at bar in all its circumstances. Kelley wanted an insurance on his stock. The agent of the defendant company came to his store, examined the stock, made a survey, and said to the plaintiff, "that he would take the risk, make out the policy and send it down, at 70 cents (\$14 on \$2,000); that he would make it binding from the first of July; and that plaintiff should have the policy." Nothing was said about the time the premium should be paid. The only respect in which it differs at all from this case is, that in this case the agent did not, in express words, say upon what date he would make the renewal of the insurance take effect. It was insisted in that case, as in this, that as the policy contracted for contained a provision that it should be void unless the premium was paid, and requiring prepayment to make it valid, no recovery could be had unless the premium was paid before the loss. The court held that an oral contract to insure, supported by a sufficient consideration, which is to take effect forthwith, although entered into contemporaneously with an agreement by the insurers to deliver a policy, and by the assured to accept subsequently, as a substitute therefor, a written policy by the former in the form usually adopted by them, becomes binding and remains in force until the delivery or tender of such policy; and until such delivery or tender, the condition of prepayment of the premium usually inserted in such policies to make them binding, unless expressly adopted by the parties in such oral contract, forms no part of the contract of insurance between them.

The court on the trial charged the jury, if they found the facts as stated by Kelley, and as I have above quoted them, "they would constitute a contract between the parties, and the defendant would be liable, because under such state of facts the delivery of the policy would be immaterial;" and upon the appeal the court sustained this charge. And it was further held that, to relieve itself from the effects of such parol con-

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tract, it was necessary that the company should tender the policy and demand the premium, and that a tender of a policy which was not properly countersigned by the agent in order to make it binding on the company, and a demand of the premium upon such tender, and nonpayment of the premium, would not defeat a recovery on the oral contract.

The general principles of the decision above quoted are supported by an abundance of authorities.

There can be no doubt that, in the case at bar, the agent with whom the plaintiff was dealing, having power not only to contract for insurance, but to issue and deliver policies, could bind the company by a parol agreement to insure the plaintiff's property and issue a policy therefor; and if the plaintiff had shown that he had agreed to issue the policy, to take effect on and after the day the conversation was had, and that the premium should be paid when the policy was made out and delivered, the company would have been bound to have paid the loss. The other members of this court having, after mature deliberation, arrived at a different opinion, it it would be arrogant for me to say that it is clear that the evidence in this case shows that such a contract was made between the plaintiff and the agent; but I am constrained to say that, to my mind, it is clear from the evidence that such was the intention of the parties, and that both so understood it at the time. The agent, by his subsequent statement, in effect admits that he so understood it, and that the reason he did not make out the policy was because he had learned the plaintiff had sold the property.

It would be, I think, a fair test of what the contract was, to consider what would have been the liability of the plaintiff if the agent had made out a renewal of the policy, to take effect from the day of the conversation, and had tendered the policy and demanded the premium on the day, the plaintiff returned from his business abroad, the day before the fire. In that case it appears very plain to me that the plaintiff would

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have been liable for the premium, and that in an action therefor by the company the company must have recovered.

To my mind it is not giving a just construction of the parol agreement to say that either party understood that the contract for insurance was for an insurance to commence in the future at some indefinite time, or not to commence at all unless the agent should see fit to make out and deliver a policy. The agent could not so have understood it.

The plaintiff had before informed the agent that, in case he concluded to continue the insurance, he would see him again about it. He does see him again, and very clearly informs him he wishes to continue the insurance for another year. All the terms of insurance are agreed upon, including the rate of premium. The agent is informed that the plaintiff was about to leave his home for a week or ten days, and says he wants it attended to before he leaves. The agent tells him he will attend to it—that it is all right; and when asked if there is anything further he wants from the plaintiff then, he says no, and makes no suggestion that no insurance can be made until the premium is paid. Under this state of the facts of the case, it appears to me, the fair inference is, that both parties understood that the intention was to have an insurance upon the property from the time the conversation took place; or, if not, within such reasonable time as the agent could make out the necessary papers and entries.

It is against the whole tendency of the language used to say that there was no obligation on the part of the agent to go on and make out the necessary renewal papers until the plaintiff again called upon him and tendered him the premium, and demanded them of him. If such construction be given, then there would seem to be no reason for the conversation at all, as it all amounted to nothing, unless further negotiations were had. It seems to me a just inference from the conversation that the plaintiff was to leave presently, to be absent for a week or ten days, and that he desired to have the property insured before he left.

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The fact that he was about to leave was made a prominent reason for making the agreement to insure then. There would be no sense in the plaintiff's making importance of the fact that he was to be absent about eight or ten days, as a reason for negotiating for insurance, if he did not intend to be insured until he returned. Without further discussing the evidence on the facts, I am of the opinion that there was a contract on the part of the defendant's agent to insure the plaintiff's buildings presently, and that such contract binds the defendant; or that at least there was sufficient evidence to sustain this view of the case to carry the case to the jury, and that it was error on the part of the court below to take the case from the jury and direct a peremptory nonsuit.

By the Court.—The judgment of the circuit court is affirmed.

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PARTNERSHIP. (1) *Evidence of partnership.* (2) *When former partner liable for debt contracted after a dissolution.*

1. A chattel mortgage in the usual form from A. to B. is not evidence tending to show the existence of a *partnership* between them at its date.
2. In an action to charge two persons as partners, if plaintiff shows that a partnership existed between them at a certain time, and was known to the public at the place of business of the firm, and that no notice of dissolution was ever given, he may further show that at the time of the transaction in question such partnership, to plaintiff's knowledge, was *generally reputed to continue*, and that the debt was contracted in the firm name, and upon the credit of the firm, though after a dissolution in fact; it being then for the jury to determine whether the retiring partner had so acted after the dissolution as to hold himself out as still a partner, and had thus rendered himself liable. So *held* where the firm name was the same as the individual name of the person who continued the business, and where the plaintiff had never done business with the firm during its actual existence.

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APPEAL from the Circuit Court for *Rock* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover the balance due the plaintiff for a quantity of coal alleged to have been sold by him to *George Covert*, the respondent, and *Augustus Covert*, as partners in business, on the first of December, 1876. The respondent denies that he was a partner in business with the said *Augustus Covert* at the time of the sale of said coal, or at any other time after the middle of March, 1874, and further denies all indebtedness, on account of said coal, to the plaintiff.

"The evidence shows that the coal was bought by *Augustus Covert* at the time stated in the complaint; that previous to March, 1874, *Augustus Covert* carried on business in his own name, buying and selling grain, coal and other things, at Clinton, Rock county, Wisconsin; and that he continued such business in said place and in the same manner, until after the purchase of the coal of the plaintiff; that, although the business was done in the name of A. Covert, the respondent was a partner in said business down to the middle of March, 1874; and that he was known to be such partner in said business at Clinton, where the same was carried on, until March, 1874.

"The respondent testified on the trial, that about the middle of March, 1874, he dissolved his connection with A. Covert as a partner, and has not been in any way connected in business with him as a partner since that date; that no notice of the dissolution of such partnership was given either to individuals or to the public generally; and that the plaintiff had no knowledge of the existence of such partnership whilst it existed, was an entire stranger to *Augustus Covert* previous to the time he sold the coal to him, and never had any dealings with the alleged firm of *Augustus Covert* and *George Covert* until he sold the coal in question.

"Under the rulings and instructions of the court, the jury found a verdict in favor of the respondent, *George Covert*, upon which judgment was entered; and the plaintiff appeals, and

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alleges as error that the circuit judge improperly excluded certain evidence offered by him on the trial, and refused to give certain instructions to the jury requested by him."

For the appellant, there was a brief by *Cassoday & Carpenter*, and oral argument by *Mr. Cassoday*.

For the respondent, there was a brief by *Bennett & Sale*, and oral argument by *Mr. Bennett*. They contended, among other things, 1. That the statement of Augustus Covert that he and the respondent were partners, was not admissible against the respondent. *Burgue v. De Tastet*, 3 Starkie, 53; *Flower v. Young*, 3 Campb., 240; *Tinkler v. Walpole*, 14 East, 226; *Cooper v. South*, 4 Taunt., 802; *Whitney v. Ferris*, 10 Johns., 66; *Tuttle v. Cooper*, 5 Pick., 414; *Robbins v. Willard*, 6 id., 464; *McPherson v. Rathbone*, 7 Wend., 216; *Kirby v. Hewitt*, 26 Barb., 607; *Hoppock v. Moses*, 43 How. Pr., 201; *Davidson v. Hutchins*, 1 Hilt., 123; *Whitney v. Sterling*, 14 Johns., 215; *Allcott v. Strong*, 9 Cush., 323; *Grafton Bank v. Moore*, 13 N. H., 99; *Chase v. Stevens*, 19 id., 465; 2 Greenl. Ev., 484, note 6. 2. That general reputation is not competent evidence to show the existence of a partnership. Collyer on Part., § 777; *Smith v. Griffith*, 3 Hill, 533; *Mills v. Shult*, 2 E. D. Smith, 139; *Scott v. Blood*, 16 Me., 192; *Hicks v. Cram*, 17 Vt., 449; *Carlton v. Ludlow Woolen Mill*, 27 id., 496; *Brown v. Crandall*, 11 Conn., 92; *Joseph v. Fisher*, 3 Scam., 137; *Carter v. Douglass*, 2 Ala., 499; *Lockridge v. Wilson*, 7 Mo., 560; *Sinclair v. Wood*, 3 Cal., 98. 3. That there was no error in refusing the instruction asked by plaintiff, that if a partnership was found to have existed at any period there was a presumption that it continued until public notice of dissolution. When a partnership is for a limited time, it will expire by its own limitation; if for an indefinite time, it may be dissolved by either party (*Skinner v. Tinker*, 34 Barb., 333; *Pine v. Ormesbee*, 2 Abb. Pr., N. S., 375); and many other things work a dissolution without public notice, such as death, insanity

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or bankruptcy. *Griswold v. Waddington*, 15 Johns., 57. And public notice of dissolution is not sufficient as to those who have had dealings with the firm, but actual notice must be given them. 4. That want of knowledge of the dissolution of the partnership could not avail the plaintiff, because he had no dealings with the firm until long after it ceased to exist, if it ever existed. *Brisbau v. Boyd*, 4 Paige, 17; *Davis v. Allen*, 3 N. Y., 168. If respondent was a partner in 1873-4, he was only a dormant partner, his name not appearing in the business (*North v. Bloss*, 30 N. Y., 374; *Kelley v. Hurlburt*, 5 Cow., 534; *Mitchell v. Dall*, 2 Harris & Gill, 159; Collyer on Part., § 4; Parsons on Part., 34, § 5, note p; id., 431 [*416], and 432, note j); and a dormant partner is only chargeable to third persons in respect of contracts entered into by the firm while he is actually a partner. Collyer on Part., § 536; *Evans v. Drummond*, 4 Esp., 89; *Kelley v. Hurlburt*, *supra*; *Grosvenor v. Lloyd*, 1 Met., 19; *Armstrong v. Hussey*, 12 S. & R., 315.

TAYLOR, J. The plaintiff, as evidence tending to show an existing partnership between the two Coverts, offered in evidence a chattel mortgage purporting to have been given by Augustus Covert to *George Covert* to secure the sum of \$2,000, dated February 13, 1877. This was objected to by the defendant, and excluded by the court. We think this evidence was properly excluded. It is difficult to understand how the giving and taking of the mortgage would tend to prove a partnership. It seems to us the only relationship between the parties, which would be proved by this transaction, would be that of debtor and creditor.

The plaintiff also offered to show by his witnesses, "that from July, 1873, to the middle of February, 1877, the business of buying and selling grain, coal and other things in the village of Clinton, Rock county, Wisconsin, carried on in the name of A. Covert, was understood by the public there as being carried on by *George Covert* and Augustus Covert in

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partnership, and during that time *George Covert* lived in the village, where he could know of the fact;" and this testimony was offered "for the purpose of corroborating the other testimony given in the case that they were actually partners." The plaintiff further offered to prove "that during that time Augustus and *George Covert* had the general reputation in the neighborhood where they lived of being partners in the business, and that *George Covert* had the general reputation of being the responsible member of the firm, and Augustus Covert the reputation of being the irresponsible member of the firm." The plaintiff's counsel then said to the court, "that he made the offer for the purpose of corroborating other direct testimony in the case tending to show such partnership, and repeated the offer separately for the purpose of showing that the plaintiff sold the goods in question on the faith and credit that *George Covert* was a partner of his brother Augustus in that business, and did the business in the name of A. Covert."

The plaintiff testified that he first saw Augustus Covert at his office in Milwaukee, in the latter part of October, 1876, when he desired to purchase some coal; that Augustus Covert made certain statements to him, upon which he made inquiries at the commercial agency, and was to ship the coal if he found his statements correct; and that he did not see him again until after he shipped the coal.

The counsel for the plaintiff then offered to prove by him "that Augustus Covert at the time represented that his brother *George* was a partner of his, and that he was responsible, and that the business was carried on in the name of Augustus Covert on account of his brother having another partnership, in the drug business; and that the plaintiff declined to send the goods at all until he investigated by inquiries at the commercial agency; that he did make such inquiries, and learned from those inquiries that *George* was a partner; and that he shipped the goods on the faith and credit of *George* being a partner of Augustus Covert."

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These several offers of evidence were rejected by the court, and proper exceptions were taken by the plaintiff to each of the rulings of the court in rejecting them.

After the evidence was closed, the plaintiff's counsel asked the judge to instruct the jury as follows: "If you find from the evidence that at any time between July, 1873, and February, 1877, *George Covert* was partner with Augustus Covert, under the firm name of 'A. Covert,' then the presumption is that he continued such partner until public notice of the dissolution of the firm." This was refused, and exception taken.

The record shows that evidence had been given on the trial which tended to show, and as the learned circuit judge charged the jury, did show, that for some time previous to the middle of March, 1874, the respondent, *George Covert*, was doing business with his brother Augustus as a partner in the grain and coal business at Clinton, in this state, under the name of "A. Covert;" that the existence of such partnership was known to the people of Clinton and others previous to March, 1874; that no notice of the dissolution of such partnership had been given by either party thereto, in any way, previous to the date of sale of the coal by the plaintiff; that the plaintiff had never had any dealings with the partnership previous to the sale of the coal, and knew nothing of the existence of such partnership until the time he made the sale; that the partnership had in fact been dissolved by private agreement between the parties, about the middle of March, 1874; and that the plaintiff had no knowledge of such dissolution at the time he made the sale.

In this state of the evidence it is claimed that, notwithstanding the partnership had been dissolved by the mutual agreement of the parties, as no notice of such dissolution had been given, it was competent for the plaintiff to show that they were generally reputed to be still partners in the same business, in the place where the business had been carried on, down to the time of the sale made by the plaintiff to them.

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When the fact of a partnership has been established by competent evidence, and the fact of its existence has become known to the public where the business is carried on during the existence of such partnership, and no notice of a dissolution of the partnership has been given, we are of the opinion that it is competent to show that it was generally reputed that such partnership continued, for the purpose of charging the retiring partner with the payment of debts contracted in the name and upon the credit of such firm after a dissolution in fact. In such case, the retiring partner not having done anything to notify the public that he has retired from the partnership, it may be presumed that he had knowledge of such general reputation; and if he permits such reputation to prevail, and does nothing to correct the public opinion, he is in law bound to respond to those who have acted upon such reputation and given credit to the firm as a continuing firm upon the faith thereof. In such case, the retiring partner comes clearly within the rule laid down by all the authorities, which hold the retiring partner still liable if he does anything to induce a belief in the public that he still remains a member of the firm, such as permitting his name to be used by the remaining partners, or permitting it to remain on the premises, cards, checks, invoices, etc., after his retirement. 2 Bell's Cases, book 7, ch. 2, p. 532; *Williams v. Keats*, 2 Starkie, 290; Story on Partnership, § 160; *Davis v. Allen*, 3 Coms., 168. If he knows of such general reputation, and does nothing to counteract the effect thereof, he must be considered in law as still holding himself out as a partner in the business, notwithstanding he has by a private arrangement retired from the same.

If we were to hold, as is claimed by the learned counsel for the appellant, that, when it is once shown that the defendant was a partner, he remains liable for all debts contracted by any member of the firm relating to the partnership business until the retiring partner gives notice of the dissolution of the

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firm, it would be wholly unnecessary to consider this question of the evidence of reputation. Although the respondent's name did not appear in the firm name, which was, in fact, the individual name of his brother, and he might therefore be considered, in one sense, a secret or dormant partner, and therefore only liable for debts contracted while he was in fact a partner, yet, it having become a matter of public notoriety during the existence of his partnership with his brother, that he was a partner in the business carried on in the name of "A. Covert," he no longer remained a secret or dormant partner, but became chargeable in the same manner as though his name had appeared in the firm name; and, in order to relieve himself from responsibility as such partner, after his connection therewith had become public, he was bound by the same rules which are applicable to public partnership. *U. S. Bank v. Binney*, 5 Mason, 176-185; 2 Bell's Cases, book 7, ch. 2, p. 533; *Powles v. Page*, 3 C. B., 16; *Evans v. Drummond*, 4 Esp., 89; 3 Coms., 168-172; *Carter v. Whalley*, 1 Barn. & Ad., 11. But we are not disposed to hold that a retiring partner remains liable to all persons thereafter dealing with the continuing partners, though no notice of dissolution has been given; but are inclined to hold that he only remains liable to those who had previous dealings with the firm, and those who knew of the existence of the firm previously, and made their sales or contracts with and upon the credit of such firm. In the case at bar, if the plaintiff had had no knowledge that there ever had been a firm of Augustus and George Covert, and had sold his coal to Augustus, he could not afterwards charge the firm of Augustus and George with it, upon discovering that such firm had existed and was reputed still to exist, if it had been in fact dissolved. In such case, he would have given no credit to the firm, but the sole credit would have been given to the purchaser; and, as the former partner had in fact retired, and therefore received no advantage from the purchase, he could

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not be held liable therefor. In such case, the retiring partner, as to such creditor, would be no more liable than though he had formerly been a strictly secret or dormant partner, and had retired before the credit had been given to the open partner. Story on Partnership, §§ 159, 160; note 1, § 336; *Pratt v. Page*, 32 Vt., 13; *Holdane v. Butterworth*, 5 Bosw., 1; *City Bank of Brooklyn v. McChesney*, 20 N. Y., 240.

As the evidence in this case shows that the plaintiff had no former dealings with the firm, and did not know of its existence until immediately before the sale was made, he could not recover in this action unless he showed that, previous to making the sale, he had knowledge that such firm was reputed to exist, and that his sale was made on the faith that it continued to exist at the time of the sale. It was therefore important for him to show, *first*, that he was informed that such a firm was reputed to still exist; and *second*, that he sold his coal on the credit of such firm. We are of the opinion that the evidence offered and rejected should have been received for this purpose, and that the offers of evidence which were rejected tended to prove these facts.

If the plaintiff had, in addition to the fact of the previous existence of the firm, shown that the general reputation in Clinton, at the time of the sale, was that the partnership continued between the Coverts, that he made inquiries, and was informed that such reputation prevailed there, and that he sold the coal upon the strength of such information, we are inclined to think he would have been entitled to recover, notwithstanding the dissolution of the partnership, unless respondent showed that he had given a public notice of such dissolution, or that the plaintiff had knowledge from some other source that such partnership had been dissolved, or that he had no knowledge of the fact of such general reputation.

We are not inclined to hold that a party who never had any dealings with or knew of the existence of a firm whilst it was in fact in existence, can recover against a retiring part-

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ner, when no notice of the dissolution of the firm has been given, upon mere proof that the remaining member or members of the firm stated to him, at the time of his making sales to them, that such firm had existed and still existed, in the absence of any proof that the retiring partner had done anything or permitted anything to be done which would induce the public to believe that he still remained a member of such firm; but if he knowingly permits a reputation to grow up in the community where the firm has done business, that he still continues to be a member of such firm, and does nothing to correct such reputation, he will be held liable to parties who, acting upon the strength of such reputation, give credit to the firm.

As the appellant offered to show this reputation, and also prove that upon inquiry this reputation was brought to his knowledge, and that he acted upon the fact of such reputation in making the sale of the coal, we are of the opinion that the evidence should have been received, and that it was error to reject the same. 2 Greenl. Ev., § 483; *Bernard v. Torrence*, 5 Gill & Johns., 383-405; *Carlton & Manning v. Ludlow Woolen Mill*, 27 Vt., 496, 498.

We are inclined to hold, both upon principle and authority, that general reputation is not admissible to prove the fact of partnership, nor as corroborative of other evidence to prove such fact; but, as a person who is not in fact a partner, may, by holding himself out as such, render himself liable to parties who deal with the firm on the presumption that the fact exists which his acts tend to evidence, it may be that general reputation in the community where he resides that he is a member of a firm doing business there, especially when such reputation is created by the acts and declarations of the party himself, or even if he have knowledge of such reputation and permit it to exist without any contradiction on his part, may be given in evidence in favor of one who has acted upon the fact that such reputation existed, and given credit to the firm on account

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thereof. But, without resting our opinion in this case upon that theory, we are very clear that where a partnership in fact has been established and become known to the public, and one of the partners retires, giving no notice of his so doing, general reputation in the community where the business of the firm was transacted, and where the retiring partner resides, that the partnership still continues, can be given in evidence by one who thereafter gives credit to the firm upon the strength of such reputation, in order to charge such retiring partner. If a retiring partner would free himself from contracts thereafter made in the name and on the credit of the firm, it is his duty, at the very least, to do nothing and permit nothing to be done which shall tend to prove that he still continues a member thereof.

The general rule is, that he will remain liable to all persons who have had dealings with the firm, until he gives them notice of the dissolution, or until they have in fact notice of such dissolution from some other source. *Young v. Tibbitts*, 32 Wis., 79; *Clapp v. Upson*, 12 Wis., 492. As to those who had no dealings with the firm, but knew of its existence whilst the firm was doing business as such, a public notice of such dissolution will be sufficient to relieve the retiring partner as to such parties thereafter doing business with the firm; and to those who neither had dealings with nor knew of the existence of the firm whilst it existed, he will not be liable even though no notice of dissolution of any kind be given, unless he does some act or acts, or permits or suffers acts or things to be done, which would lead such persons, having knowledge thereof, to believe that the firm continued to exist at the time of their dealing with the other partners on the credit of such firm. And, as we have said above, if he knowingly permit it to be generally reputed in the place where he resides, that he still remains a member of the firm, and take no step to deny or counteract such general reputation, such reputation may be received in evidence for the purpose of charging such retiring

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partner with a debt contracted by the other members of the firm with one who had knowledge of such reputation and gave credit to the firm on the strength thereof. At all events, such evidence is competent, and must be submitted to the jury, upon the question whether the retiring partner has, since the dissolution, so held himself out as still continuing a member of the firm, as to render himself liable to those dealing with the firm and giving credit to it.

As stated above, we think the instruction asked by the appellant was too broad, and was therefore properly rejected.

For the error in rejecting the evidence offered by the plaintiff, the judgment must be reversed.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

LORD VS. THE CITY OF OCONTO.

(1) *Pleading.* (2) *Delegated power (of city council) not to be delegated.*

Complaint, that by certain acts of the legislature the defendant city was authorized to construct a pier into Green Bay and a road thereto from the city limits, and to keep the road in good repair, and the mayor and common council of said city were empowered to fix, regulate and collect tolls upon said pier; that, the city having constructed such pier and road, the common council leased the pier to plaintiff for one year for a specified sum; that by said lease plaintiff acquired the valuable privilege of charging commissions for all merchandise and freight landed at or shipped from said pier, which amounted to a specified sum for the year previous to the action; and that, by reason of defendant's neglect to maintain said road in good repair, plaintiff had suffered damage by loss of tolls or commissions for the use of said pier, in a sum named. *Held*, on demurrer,

1. That as there is no averment that the mayor and common council, or the plaintiff under his lease, had ever fixed and regulated the tolls upon the pier, no damage is shown.
2. That the power of the common council to regulate the tolls could not be delegated, and the lease was void.

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APPEAL from the Circuit Court for *Oconto* County.

This appeal was taken by the plaintiff from an order sustaining a demurrer to the complaint as not stating a cause of action. The substance of the complaint is stated in the opinion.

The cause was submitted on the brief of *W. H. Webster* for the appellant, and that of *Hastings & Greene* for the respondent. To the point that the alleged lease of the pier in question, by the city of Green Bay to the plaintiff, was void, because the city held the power to regulate the tolls at such pier as a trust for the public, and could not abandon the trust, or deprive itself of the power of regulating the tolls at any time by its officers, respondent's counsel cited *Milbau v. Sharp*, 27 N. Y., 611; *Thompson v. Schermerhorn*, 6 id., 92; *Brooklyn Park Comm'rs v. Armstrong*, 45 id., 234; 32 id., 261; *State v. Mayor, etc.*, 3 Duer, 130; *Britton v. Mayor*, 21 How. Pr., 251; *Gale v. Kalamazoo*, 23 Mich., 344; *Davenport v. Kelley*, 7 Clarke (Iowa), 102; *Mullarky v. Cedar Falls*, 19 Iowa, 21; *Oakland v. Carpentier*, 13 Cal., 540; 102 Mass., 19; *Day v. Green*, 4 Cush., 433-9; *Goszler v. Georgetown*, 6 Wheat., 593; *Lauenstein v. Fond du Lac*, 28 Wis., 336; *Cooley's Con. Lim.*, 204 et seq.; *Dillon on M. C.*, §§ 60, 445, 567, 618. Even private corporations cannot, without express authority, transfer corporate property or powers in which the public has an interest. *Comm. v. Smith*, 10 Allen, 448; *Richardson v. Sibley*, 11 id., 65.

OSTON, J. The complaint states, substantially, that the city of Oconto, by chapter 104, P. & L. Laws of 1870, and chapter 256, P. & L. Laws of 1871, was authorized to construct a pier into Green Bay, and a road from the limits of the city to connect with the same, and to keep the road in good repair, and the mayor and common council of said city were empowered to fix, regulate and collect tolls upon said pier, and, the city having constructed the same, the common council leased the pier to the plaintiff for one year for \$105, which was paid; and that

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by virtue of said lease the plaintiff acquired the valuable right and privilege to charge commissions for all merchandise and freight landed at and shipped from said pier, which amounted in the year previous to the sum of \$721. The action is brought for damages in the loss of tolls or commissions for the use of said pier during said year, occasioned by the want of repair of said road. A general demurrer to this complaint was sustained, and the plaintiff appeals.

It is quite clear that the plaintiff obtained by this lease, if anything, the tolls of the pier and the right to fix and regulate the same only, and not the pier itself; for the pier as well as the road was constructed for the use of the public. The complaint does not show that the mayor and common council ever fixed and regulated the tolls upon the pier, except inferentially, or that the plaintiff, under the lease, had exercised the power, and therefore shows no damages. But the lease itself is unquestionably void.

The power to regulate the tolls was vested *solely*, by the legislature, in the mayor and common council, and such power could not be delegated by the common council alone, or jointly with the mayor, to any other officers or persons by lease or otherwise. This principle is elementary, and scarcely needs the support of reported cases, but is most distinctly recognized in all of the cases upon the subject. • 1 Dillon on M. Corp., §§ 60, 445, 618; Cooley's Con. Lim., § 204. In *Lauenstein v. The City of Fond du Lac*, 28 Wis., 336, where the law conferred upon the common council, in connection with the board of education, the power to purchase a site for a school house, it was held that such power could not be delegated by the common council to the board of public works, and that a contract for the purchase of such site, entered into by the board of education, was not binding.

In *Mullarky, Administrator, v. The Town of Cedar Falls*, 19 Iowa, 21, where the town conveyed away by deed of trust a toll bridge, with the franchise of collecting the tolls, it was

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held that the town could not delegate such power to collect the tolls, and that the deed for such purpose was void. The same principle, in nearly parallel cases, is recognized in *Gale v. The Village of Kalamazoo*, 23 Mich., 344, and in *Milhan and others v. Sharp and others*, 17 Barb., 435, and in the numerous cases in the brief of the respondent's counsel.

The lease being void, the plaintiff obtained no right which could be impaired by the neglect of the city to keep the road in repair, and suffered no damage. The demurrer was properly sustained.

By the Court. — The order of the circuit court sustaining the demurrer to the complaint is affirmed, with costs, and the cause remanded for further proceedings according to law.

NIGHTINGALE VS. BARENS.

PROCEEDING AGAINST TENANT HOLDING OVER. (1) *Defendant held to be in with other rights than those of a lessee.* (2) *When defendant's rights not waived by his failure to assert them.*

1. Action commenced in justice's court by N., under the statute, to remove B. from certain premises as N.'s tenant in arrears for rent. The alleged lease was set out in the complaint. Answer, a general denial, and that the alleged lease was obtained by fraud and duress, and that the true agreement between the parties was, that B. was to have the use of the land for three years without rent, and the right to purchase it at the end of that time for \$5,600; and that he had paid N. \$1,000 on the contract. B.'s objection to the introduction of the lease in evidence by N. was overruled; and, after N. had further proved nonpayment of rent, and service of the statutory notice, a nonsuit was refused. B.'s evidence showed the following facts: In 1875, N. obtained a judgment of foreclosure of a mortgage on said lands, then belonging to B., for about \$4,400, principal and interest, and, while an appeal from such judgment was pending here, proceedings not having been stayed, the lands were sold on the judgment, and purchased by N. for the amount thereof, and he was partially placed in possession by writ of assistance. The parties then entered into an arrangement by which the amount of the judgment and

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interest at ten per cent. thereon, and of two other judgments and interest thereon amounting to about \$1,000, was computed, and the total sum of \$6,600 found due, and \$1,000 was paid thereon by B., and his appeal here was dismissed by stipulation, and he was let back into possession of the premises under the instrument set out in the complaint. The main body of said instrument is in the form of a lease of the premises from N. to B. for three years from April 1, 1876, at the yearly rent of \$565 (five dollars being for insurance), the lessee to pay all taxes and assessments during the term; and there is added a stipulation that B., his heirs and assigns, "has the privilege to purchase said premises on the first day of April, 1879, if he shall so desire, by paying for the same the sum of \$5,600." *Held*,

(1) That, notwithstanding the sale of the premises to him on the foreclosure judgment, N., in the transaction stated, recognized the continued existence of the mortgage debt, by receiving from B. payment of \$1,000 upon a total sum which included said judgment with interest to that time, and providing in fact for the continued payment of ten per cent. interest on the remainder of said total sum, under the name of rent.

(2) That by the clear intention of the parties and the legal effect of said instrument, under the circumstances, B. reentered not as a mere lessee, but with other rights, either as prospective purchaser or as mortgagor.

(3) That the statutory proceeding, therefore, would not lie.

2. This court must determine the appeal upon its own view of the legal effect of the instrument and transaction in evidence, and no failure of defendant's counsel to assert that view in the court below would be a waiver of defendant's rights on the appeal, where the legal effect of the instrument goes to the foundation of the action and the jurisdiction of the court.

[TAYLOR, J., dissents from the judgment, holding, 1. That, upon the face of the written instrument, defendant's right of possession under it was only that of a tenant, and the court did not err in overruling defendant's objection to the evidence, nor in refusing a nonsuit. 2. That upon the pleadings and plaintiff's evidence, the justice's court had jurisdiction of the action. 3. That even if defendant's parol evidence showed a transaction giving him other rights of possession under the instrument than those of a lessee (a question not considered), yet, as that evidence was not introduced for that purpose, but the cause was tried only upon the issue of fraud and duress, the claim of such rights under the instrument was waived.]

APPEAL from the Circuit Court for *Jefferson* County.

This was a proceeding commenced in justice's court, under

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the statute, as for an unlawful detainer, to remove the defendant from certain premises, which he was alleged to hold as plaintiff's lessee, on the ground that he had made default in the payment of rent. Defendant having obtained a verdict and judgment in the justice's court, plaintiff appealed to the circuit court. The case made on the trial there will sufficiently appear from the opinion.

Defendant appealed from a judgment of the circuit court in favor of the plaintiff.

For the appellant, there was a brief by *Priest & Carter*, and oral argument by *Mr. Priest* and *Wm. F. Vilas*.

A. M. Blair, for the respondent.

OERON, J. This is a proceeding under the statute of forcible entry and unlawful detainer, before a justice of the peace, to obtain restitution of the possession of certain lands held under a pretended lease, on account of the nonpayment of rent.

The facts in evidence, stated most favorably to the respondent, are substantially as follows:

The respondent obtained a judgment in foreclosure of a mortgage upon the lands in question, against the appellant, in March, 1875, for about the sum of \$4,400, principal and interest, and an appeal therefrom had been taken to and was pending in this court, and, no stay of proceedings having been obtained, the respondent proceeded to the sale of the mortgaged premises, and became the purchaser for the amount of the judgment, and was partially placed in possession by a writ of assistance. The parties then entered into an arrangement by which the amount of the judgment and interest at ten per cent. thereon, and of two other judgments and interest thereon amounting to about \$1,000, was computed, and the total sum of \$6,600 found due, and \$1,000 was paid thereon by the appellant, and his appeal in this court was dismissed by stipulation, and he was let back into the possession of the premises

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under the instrument in writing claimed to be a lease, upon which this proceeding was brought and predicated.

The main body of this instrument is drawn in the form of a lease, from the respondent to the appellant, of the premises, for three years from the first day of April, 1876, at the yearly rent of \$565 (five dollars being for insurance), the lessee to pay all the taxes and assessments during the term; and then follows this stipulation: "And the said party of the second part, his heirs and assigns, has the privilege to purchase said premises on the first day of April, 1879, if he shall so desire, by paying for the same the sum of \$5,600."

From this evidence and the character of this instrument the following inferences may properly be drawn: *First.* \$5,600 is the balance left due after deducting the \$1,000 payment, and the rent is ten per cent. per annum on this amount, the same as the interest on the original mortgage, with the addition of five dollars for insurance. *Second.* Notwithstanding the sale of the mortgaged premises to the respondent, he still recognized the existence and continuance of the mortgage debt, by receiving from the mortgagor the payment of the \$1,000 upon a total amount which included the whole of such judgment and interest up to that time. *Third.* The sum of \$5,600 named as the purchase money and consideration of the last clause of the instrument was nearly if not the exact sum then due upon the judgment of foreclosure, and this is the exact sum finally to be paid at the end of the term, and without interest, and such interest is presumably the ten per cent. reserved as annual rent in the lease. *Fourth.* The stipulation on the part of the appellant to pay all of the taxes and assessments during the term on such valuable property, in excess of ten per cent. rent, indicates that he was to pay such taxes and assessments, not as *rent*, but as one of the conditions of the purchase.

We think it is the legal effect of this instrument under the circumstances, and that it was clearly the intention of the

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parties, that the appellant should reënter into the possession of the premises, not as a mere lessee, but with other rights in the same (and whether as the prospective purchaser or as mortgagor, we do not decide); and that the relation between the parties in respect to the use and possession of the same was not merely of landlord and tenant; and therefore we must hold that this proceeding under the statute will not lie. In all the elements and particulars of this transaction, there could not well be a stronger case presented of a conditional sale or contract of purchase, or of the keeping alive and continuance of a mortgage, under the form of a lease or the assumed relation of landlord and tenant. It was decided in *Plato v. Roe*, 14 Wis., 453, that where an absolute deed and a contract of defeasance or to reconvey were executed, and the consideration was a loan of money, and the grantee also at the same time gave the grantor a lease of the premises, the transaction constituted a mortgage, and the pretended lessor could not have this statutory remedy as against a tenant holding over.

In *Ott v. Rape and another*, 24 Wis., 336, it was held that where a purchaser at sheriff's sale of land accepted part of the purchase money for which the land was sold, from the judgment debtor, he waived his right to enforce a forfeiture of the equity of redemption according to the terms of his certificate of sale, and thereby converted the certificate, and his interest in the land under it, into a mere lien or security for the payment of the balance of the purchase money.

In *Ragan and another v. Simpson and another*, 27 Wis., 355, it was held, in effect, that where, after default in the payment of a mortgage, and after the mortgagee had commenced a suit of foreclosure, he received an absolute conveyance of the mortgaged premises from the mortgagor, and at the same time gave back to the grantor a lease of the premises, in which it was stipulated that the lessor should, at the expiration of the lease, sell the premises to the lessee, in case he should tender

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a certain sum — which was the amount of the mortgage — and demand a deed, the transaction made the deed a mortgage, and the instrument *called* a lease was not such, and this remedy under the statute as against such lessee holding over could not be made available.

In *Roach v. Cosine*, 9 Wend., 227, it was held that where, in consideration of a payment of a certain sum of money, and also the payment of certain encumbrances upon the premises, a deed was executed with an agreement that the grantor might remain in possession of a part of the premises for two years *rent free*, and that if, at the expiration of that time, he should repay such advances, the grantor should reconvey, the deed was a mortgage, and this proceeding could not be entertained to dispossess the grantor as a tenant holding over.

In *Davis v. Hemenway*, 27 Vt., 589, where an absolute deed was taken in consideration of certain advances, and the grantee gave to a trustee of the original owner a contract in writing, by which he promised to quit-claim the premises to him in three years, if he paid the amount of such advances, and sixty dollars annually, and the rent upon certain dower estate in the premises, and the taxes during each year up to that time, it was held that the deed was a mortgage, and that the relation of lessor and lessee did not exist so as to allow the summary dispossession of the former owner by this proceeding.

In *Hay v. Connelly*, 1 A. K. Marsh., 393, it was held that a person in possession of lands under a contract of purchase is not a tenant, so as to subject him to a warrant of forcible detainer; and in *Jack v. Carneal*, 2 A. K. Marsh., 518, it is held that a person so in possession under a contract of purchase, who cancels such contract and takes a lease of the premises, is not liable to such warrant.

Parallel authorities of indefinite number might be cited in support of the position here taken that the appellant was in possession of the premises, not as a lessee or tenant, but under a right to purchase or redeem.

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It was claimed on the argument by the learned counsel of the respondent, that the question of such a legal effect of the transaction was not raised in the courts below, and was therefore waived. The legal character and effect of this transaction, and of the instrument introduced as a lease, to sustain this proceeding, are questions of law, and go to the foundation of the action and the jurisdiction of the court, and cannot be waived by counsel, by neglect or otherwise, in the conduct of the cause. *Rothbauer v. State*, 22 Wis., 468; *Nelson v. Rountree*, 23 Wis., 367. If this was no lease, and the relation of landlord and tenant did not exist between the parties, the justice had no jurisdiction in such a case; and it is questionable whether the answer setting up such facts as showed the defendant in possession of the premises under other right and title than the lease, or the instrument construed as a lease, did not divest the justice of jurisdiction to try the case.

What are the legal or equitable rights of the parties under this arrangement and this instrument, and whether the appellant had or has the rights of a purchaser under a conditional sale or contract of purchase, or of a mortgagor in possession under his original or a newly acquired title; while the original mortgage is kept alive and continues, we do not now decide; but we do decide that the appellant was not in possession as a mere lessee or tenant of the respondent, and therefore not liable to be dispossessed under the statute of forcible entry and unlawful detainer.

The judgment of the circuit court must be reversed.

TAYLOR, J. This is an action originally commenced in a justice's court, under the provisions of section 12, ch. 151, R. S. 1858, to remove the defendant from the premises in question, as a tenant of the plaintiff, for neglect to pay the rent reserved in a lease set out in the plaintiff's complaint. The defendant answered, denying generally the complaint, and set up as a special defense, that the lease set out in the com-

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plaint was obtained by fraud and duress, and was void, and that the true agreement between the parties was that the defendant was to have the use of the farm for three years without rent, and the right to purchase it at the end of the three years for the sum of \$5,600, and that he had paid the plaintiff \$1,000 on such contract. The case was tried in the justice's court; was appealed to the circuit court; and was there tried, and judgment rendered for the plaintiff, from which the defendant appeals to this court.

On the trial in the court below, the plaintiff offered in evidence the lease set out in the complaint; and to the introduction of this lease the defendant objected, "because it was a contract for the sale of the premises, and the action of detainer cannot be sustained on it." The objection was overruled, and the defendant excepted. This is the only time and place in which, during the whole course of the trial in the court below, any objection was made to the plaintiff's right to recover, on the ground that the contract between the parties was a contract of sale, and not a lease. After the plaintiff had introduced his written contract in evidence, he simply gave evidence showing that he had served the notice required by said section 12, and then rested; and the defendant then moved for a nonsuit, which was denied.

If, therefore, the written contract given in evidence was not a lease, but a contract of sale, the plaintiff should have been nonsuited, and the court below committed an error, in both permitting the contract to be received in evidence, and in refusing to grant the nonsuit.

The writing received in evidence was, in form, a lease for three years, reserving a rent of \$565 per year, payable on the — day of — in each year.

The only thing in the contract which differs from an ordinary lease is the following clause inserted at the end thereof: "And the said party of the second part [the defendant], his heirs and assigns, has the privilege to purchase said premises

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on the first day of April, 1879, if he shall so desire, by paying therefor the sum of \$5,600."

In my opinion, this clause, which simply gives an election to the tenant to purchase the tenement leased at the expiration of his term for a fixed sum, without in any way binding him to make such purchase or pay the purchase money, does not change the nature of the contract, or change it from a lease to a contract for the purchase of the premises. Certainly, upon the face of this contract, the defendant acquired no right to the possession of this land by virtue of the election to purchase given to him, until he had exercised his election and made the purchase or offered to make it. His right to the possession up to that time, if in possession at all, was under the lease and agreement to pay rent. *White v. Livingston*, 10 Cush., 259. The objection to the evidence was therefore properly overruled, and the nonsuit properly denied.

After making this objection to the plaintiff's evidence, and this motion for a nonsuit, the defendant tried the case in the court below entirely upon the theory that the writing was a lease, and based his whole defense upon the ground that he had been induced to sign the same by fraud and coercion, and at no time raised the question again that, by virtue of the parol evidence introduced, he had shown that the contract, though in form a lease, was in fact a contract for the purchase of the land; nor did he ask the court to submit that question to the jury, or to take the case from the jury upon the ground that the whole evidence showed that it was not a lease, but a contract of sale and purchase, and therefore the court had no jurisdiction to try the case. It may be that, as the lease contains this right of election, it would be competent to show, by parol evidence, that there was a parol contract between the parties by which the plaintiff agreed to sell, and the defendant agreed to purchase, the land, and that this lease was given to carry out such contract; but, in the absence of any mistake or fraud, it may be a question of grave doubt whether a writing

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which is a lease on its face can be shown to be a contract of sale by oral evidence. However this may be, it seems to me, if the defendant had desired to rest his case upon the fact that he had shown, by parol evidence, that the contract, which was in form a lease, was in fact a contract for the sale of the land to him for a fixed sum, and that the reservation of the annual payments as rent was in fact intended to secure the interest upon the purchase price, it was his clear duty to have asked the court to consider the case in view of that theory, and to have submitted that question to the jury; and, instead of doing so, having contented himself to rest his defense solely upon the alleged fraud and coercion, it is too late for him to come to this court and ask a reversal of the case upon that theory.

Upon the questions litigated in the court below, there was no error committed by that court, and therefore no errors for this court to correct; and the only way this court can raise any error in the case is to introduce a defense which the defendant did not make in the court below, and which I think he clearly waived, and then hold that, if such defense had been made, the evidence was sufficient to have sustained it, and therefore the judgment must be reversed.

I do not question the propriety of reversing a judgment when the record presents a state of facts which clearly shows that the court below had no jurisdiction of the subject matter of the action, even though the defendant may not have raised any objection upon that ground. But in this case, upon the written contract offered in evidence by the plaintiff, in the form of a lease, the court below had clear jurisdiction of the subject matter; and if the evidence afterwards introduced by the defendant tended to show that such writing was not a lease, and therefore the court had no power to proceed to judgment, it was clearly his duty to have alleged such purpose in introducing the evidence, so that the opposite party might have set himself right, in the court below, by showing in rebuttal

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thereof that there was no such contract in fact made. The defendant not having disclosed such purpose, but, instead, having introduced the same with the avowed purpose only of showing that the lease was obtained by fraud and coercion, and having submitted the case to the jury upon that theory, it seems to me both unjust to the plaintiff and to the court below to allow him to avail himself of that theory of the case in this court for the purpose of reversing the judgment and obtaining a new trial.

As an almost universal rule, this court may very justly presume that the counsel who tried the case in the court below fully comprehends the issues which were necessary to be submitted to a jury in order to protect his client's rights; and so, in this case, the counsel for the defendant fully understood, and now understands, the necessity of resting his defense upon the alleged fact that the contract, whatever it may be, was not freely entered into by him, and that the same is void by reason either of mistake, fraud or coercion, and upon a retrial such must be the real issue in order to procure a result which will in the least protect the defendant in his rights. If there was no fraud, mistake or coercion, and the contract was made fairly with the defendant, and he agreed to pay \$6,600 for the farm, and made a payment of \$1,000 on that agreement, then he made a bargain which is not to his advantage, and one which he would not desire should be enforced against him, as it would in fact, as he himself says, be a bargain which he would not knowingly have made, undoubtedly for the reason that such sum was more than the farm was worth.

Without expressing any opinion upon the effect of the parol evidence as changing the nature of the written lease, I think, for the reasons above stated, the judgment should be affirmed.

By the Court. — The judgment is reversed, with costs, and the cause remanded for a new trial.

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FAY VS. RANKIN and others.

Evidence.

1. Where the question was, whether certain grain, etc., seized on executions against one H., was his property or that of the plaintiff, and it appeared that it was raised on land previously conveyed by H. to plaintiff, the court instructed the jury that plaintiff was entitled to the possession of the land, and that the only question for them was, whether he raised the grain for his own exclusive use, or for the use of H., and that if he raised it for H.'s use, it was subject to seizure on the executions against H. *Held*, that evidence was inadmissible on defendant's part to show that H., conversing with the witnesses *in the absence of plaintiff*, after the conveyance of the land to the latter, claimed to have an interest in the farm or its products; the questions of conspiracy and fraudulent intent not being involved in the issue as submitted to the jury, and the rule that the declarations of one *conspirator* are admissible against the others, though made in their absence, being therefore inapplicable.
2. *Quære* whether H.'s declarations would have been admissible even if the question of fraudulent intent had been at issue.
3. Whether the court erred in charging that plaintiff had a right to the possession of the land as against H.'s creditors, is a question not raised by plaintiff's appeal.

APPEAL from the Circuit Court for *Jefferson* County.

Trespass, for breaking and entering the close of the plaintiff, and taking therefrom a large quantity of wheat, oats and hay. The answers of the defendants allege that the property was taken by virtue of certain executions duly issued on judgments recovered by some of the defendants against one Hammond, who, it is alleged, was the owner of the property.

It appeared on the trial that Hammond had previously owned the farm on which the grain and hay in controversy were grown; that he was insolvent; and that in the fall of 1874 he sold and conveyed the farm, and certain personal property thereon, to the plaintiff. The property seized was grown on the farm in 1875. The judgments and executions against Hammond, and the seizure of the property by virtue of the executions, as alleged in the answers, were duly proved.

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A sufficient statement of the evidence, and the rulings of the court on the trial, will be found in the opinion.

There was a verdict and judgment for the defendants; and plaintiff appealed from the judgment.

Edward S. Bragg, for appellant, argued that, in view of the instructions given by the court defining the issue to be tried, the evidence of admissions, acts and declarations of Hammond, in the absence of the plaintiff and after the sale and transfer to him, was inadmissible. The declarations of a grantor are not admissible to impeach the title conveyed by him, as against his grantee. 1 C. & H.'s Notes (2d ed.), 655 et seq; Note 481. It is indifferent whether the cause was tried upon a real or false issue. Such issue as the court framed, each party had to abide; and the testimony must be considered, both as to admissibility and effect, in reference to the trial as it was had. Counsel also argued other exceptions taken to the rulings of the circuit court.

For the respondents, there were briefs by *Coleman & Spence*, and oral argument by *Mr. Spence*:

Defendants claimed that the whole transaction between plaintiff and Hammond was a continuous scheme, from the execution of the deed of the land down to the bringing of this action, to cheat Hammond's creditors; that Hammond never parted with the possession or relinquished dominion; and that plaintiff never had any possession except colorably and collusively with him. The declarations of Hammond were therefore admissible, not only to show his own motive, but against plaintiff, because of the conspiracy between them, and because of the dominion he continued to exercise over the property. The general rule that the declarations of a grantor after the execution of the grant cannot be used to impeach it, has been so far modified that when the *bona fides* of the transfer is attacked by creditors under the statute of frauds, and some evidence has been given to show a common purpose of this character by the parties, such declarations are admissible; for

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whenever evidence is given to show combination or conspiracy, it lets in all the declarations of the parties against each other. *Hartman v. Diller*, 62 Pa. St., 43. Where testimony has been given on the trial tending to show that parties had combined together in making a conveyance for the purpose of defrauding the creditors of one of them, the declarations of that one disclosing the fraudulent design are admissible to be considered by the jury on the question of fraud. *McKee v. Gilchrist*, 3 Watts, 232; *Kelsey v. Murphy*, 2 Casey, 85. The declarations of Hammond, then, were evidence against the plaintiff, though made in his absence, if the two were engaged at the time in the furtherance of a common design to defraud Hammond's creditors. *Lincoln v. Claflin*, 7 Wall., 132. The common design in this case was to cultivate, harvest and sell those crops as plaintiff's, though in fact Hammond's, in order to give Hammond the benefit of them and keep them from his creditors. Very slight evidence of concert or collusion is sufficient. *McDowell v. Rissel*, 37 Pa. St., 164. It is the province of the court to determine when the common design has been sufficiently shown to admit the acts and declarations of the parties against each other; and the matter must be left largely in its discretion. 1 Greenl. Ev., § 111; *Waterbury v. Sturtevant*, 18 Wend., 353; *Cuyler v. McCartney*, 33 Barb., 165; *Orr v. Gilmore*, 7 Lans., 345; *Dewey v. Moyer*, 72 N. Y., 70; *Burke v. Miller*, 7 Cush., 549; *Peer v. Duff*, 63 Pa. St., 59.

The jury found that Hammond was in the possession of the property in controversy at the time it was levied on; and therefore his declarations were competent. *Grant v. Lewis*, 14 Wis., 489; *Selsby v. Pedlon*, 19 id., 17.

LYON, J. The learned circuit judge instructed the jury, in substance, that in law the conveyance executed by Hammond to the plaintiff vested in the latter the right to the possession of the farm conveyed, as against Hammond and his creditors,

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and the right to cultivate the farm as he saw fit, and to take from it for his own use the crops he might raise thereon; that, if the plaintiff took exclusive possession of the farm, and raised the crops in controversy for his own exclusive use and benefit, such crops were not liable to seizure on executions against Hammond; but that, if there was an understanding between the plaintiff and Hammond that the former should occupy for the benefit of the latter, and that the crops raised on the farm should be raised for the use and benefit of Hammond, the crops belonged to Hammond and were subject to seizure on execution against him.

After the jury had retired to consider their verdict, they returned into court for further instructions; whereupon the learned judge restated the issue in the following language:

"I have instructed you that you have nothing whatever to do with the title of that land. I have instructed you distinctly that under and by virtue of this deed *Mr. Fay* had the right to the possession of this land, so that the right to possession is not a question with which you have anything to do. You are to assume that he had the right to the possession. He had a deed of conveyance of the land from Hammond, the man who held the fee; under and by virtue of that deed, *Fay* had the right to possession. The question I submitted to you was, whether or not he, in his own right, for himself and at his own expense, went on and cultivated this crop upon the land during the season of 1875; or whether there was some arrangement between him and Hammond, by which the possession in fact was to be Hammond's all the while, and the crop that might be raised upon it was to be the property of Hammond. But the question as respects the legal title, I have instructed you, was not drawn in controversy here. It is simply the question of possession." Upon this issue the cause was tried and determined.

After the plaintiff had introduced evidence tending to prove that he was in the exclusive possession of the farm, and raised

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the crops in controversy thereon for his own exclusive use and benefit, the defendants were allowed to show, by one Nichols, who had been employed by the plaintiff to work on the farm, that in the spring of 1875 Hammond told the witness not to borrow tools of a certain neighbor, but that if anything was wanted on the farm, he (Hammond) would go to Milwaukee and get it. Also, that Hammond came by the farm where witness was plowing, and gave him directions concerning the use of the team, saying that he had an interest in the team. The plaintiff was not present at either of these conversations. The admission of this evidence is assigned as error. The learned counsel for the defendants argued that the evidence was admissible on the principle that the declarations of a conspirator are admissible against his co-conspirators, although made in their absence; or, at least, that they were admissible to show the fraudulent intention of Hammond. This argument assumes that the questions of conspiracy and fraudulent intention are involved in the issue, as submitted to the jury; but we think they are not. Under the instructions given to the jury, if the farm was in the exclusive possession of the plaintiff, and was carried on, and the crops in controversy grown, for his sole use and benefit, he was entitled to recover; and it is quite immaterial whether it was or not so possessed and carried on for the purpose and with the intention on his part to defraud the creditors of Hammond. On the other hand, if the farm was carried on and the crops grown for the use and benefit of Hammond, in whole or in part, under the instructions, such crops were subject to seizure on execution against Hammond, even though the transactions between him and the plaintiff were entirely honest, and neither of them intended to delay or defraud the creditors of Hammond. Hence we are unable to hold the evidence admissible on the grounds urged by counsel.

Were this a contest for the crops between the plaintiff and Hammond, it is clear that the latter would not be allowed to

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prove his own statements or declarations, made in the absence of the plaintiff, to sustain his claim to the property. The defendants claim through Hammond. Their right to hold the property seized depends upon Hammond's ownership of it. Whether he is the owner is the precise issue which has been tried — not whether he has made a fraudulent disposition of the property.

We are unable to perceive why a different rule of evidence should be applied here than would be applied were Hammond, instead of his creditors, a party to the action claiming the property. Moreover, were the question of fraudulent intent involved in the issue, we should hesitate to hold that the declarations of Hammond that he had an interest in the property, made in the absence of the plaintiff, and while the latter was ostensibly in possession of and carrying on the farm, and which were no part of the *res gestæ*, are admissible to prove the fraudulent intention of Hammond. It would seem that to admit such evidence would be to enable any grantor or vendor to endanger the title of his grantee or vendee, at any time, by loose declarations or statements not made under the sanctions of an oath, which cannot be subjected to the scrutiny of a cross-examination, and which may have been maliciously made for the express purpose of defeating the title which he had conveyed.

We conclude that the testimony of the statements of Hammond to Nichols was improperly admitted.

It is evident that this testimony may have had influence with the jury in determining (as they did) that the crops in controversy were raised for the use and benefit of Hammond. The probability that it had such influence is strengthened by the fact that, when the jury returned into court for further instructions, the testimony of Nichols was read to them at their request, after which they agreed on a verdict for the defendants. The error in admitting the testimony is therefore fatal to the judgment.

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Whether the court erred in holding that the conveyance by Hammond to the plaintiff vested in the latter the right to the possession of the farm, as against the creditors of Hammond, is a question not presented by this appeal, and we do not determine it.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

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FRAUD AS TO CREDITORS. (1) *When debtor's lease of land not fraudulent.*
MEASURE OF DAMAGES: (2-5) *For conversion or nondelivery of goods.*

1. Where farm crops seized on execution were claimed by the debtor's lessee of the land, under a lease for a term which would expire before any right to the land could be acquired under the judgment: *Held*, that the only question of fraud that could arise was, whether the lease was merely colorable, with an understanding between the parties thereto that the crops should enure to the lessor's benefit.
2. In actions for the tortious taking or conversion of goods, or for breach of contract to deliver goods, unless plaintiff has been deprived of some special use of the property, anticipated by the wrongdoer, or is entitled to exemplary damages, the general measure of damages is the value of the chattels at the time and place of the wrongful taking or conversion, or at which delivery was due, with interest to the time of trial.
3. In case of a wrongful taking or conversion, if defendant has sold the goods, plaintiff may, at his election, recover the amount for which they were sold, with interest from the sale to the trial.
4. If the chattels wrongfully taken or converted are still in defendant's possession at the time of trial, plaintiff may, at his election, recover their present value at the place of the taking or conversion, and in the form in which they were when taken or converted.
5. These rules do not apply to cases in which damages are regulated by special statutes.

APPEAL from the Circuit Court for *Jefferson* County.

Action to recover the value of a quantity of hay, wheat and oats, which the plaintiff claims to own, and which, he alleges,

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was wrongfully taken from his possession by the defendants and converted to their use. Defendants took the hay and grain by virtue of an execution upon a judgment in their favor against one Hammond, the owner in fee of the land upon which the same was raised and found. Plaintiff had a lease of the land from Hammond for six months from its date, March 6, 1875; and the chattels were seized during that term.

Defendants appealed from a judgment in favor of the plaintiff. The errors which they alleged in the instructions, are stated in the opinion.

For the appellants, there was a brief by *Coleman & Spence*, their attorneys, and *C. A. Eldredge*, of counsel, and oral argument by *Mr. Spence*.

Edward S. Bragg, for the respondent.

TAYLOR, J. The appellants assign as errors, that the circuit judge erroneously instructed the jury as to the measure of damages the plaintiff was entitled to recover, and erred in instructing the jury, in substance, that the written lease under which the plaintiff asserted his right to the possession of the land upon which the grain and hay in controversy were raised, was valid and not impeachable for fraud.

It is insisted by the learned counsel for the respondent, that the leasing of real estate by a judgment debtor could not be in fraud of his creditor, as it in no way interferes with the judgment creditor's right to seize and sell such real estate upon his judgment; and especially in this case it could not be in fraud of any such creditor, because the lease did not continue but for one year, as it would have been impossible for the creditor to have obtained any right of possession to the real estate, by virtue of his judgment, within the year. We are inclined to hold that the circuit judge was right in his view of this question, as explained by him to the jury, and that the instruction which was given to the jury upon that question was sufficiently favorable to the defendants. The instruc-

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tion was as follows: "But, if the possession of the plaintiff was in reality the possession of Hammond—*i. e.*, if there was an arrangement or understanding between them that the plaintiff should occupy for the benefit of Hammond, that the crop should be raised on the land for his use and benefit, or that whatever the plaintiff might do on the land should be for the advantage and benefit and in the interest of Hammond, — then the crop raised was the individual property of Hammond, and was subject to execution against him, and your verdict must be for the defendant."

It is apparent, from this instruction, that the court fairly submitted to the jury the question whether the lease was merely colorable, and intended as a mere cover, to be used for the purpose of securing to the lessor, the judgment debtor, the benefit of the crops raised on the leased premises, in fraud of his creditors; and this, certainly, was the only question in issue between the parties, which could be litigated in the action. If there was no understanding, either expressed or implied, between the lessor and the lessee, that the crops raised on the leased premises should enure to the benefit and advantage of the lessor, there could be no question of fraud in the case; and it was true, in the sense in which the learned circuit judge understood the case, that the lease itself could not be impeached for fraud.

Upon the question of damages, the court instructed the jury as follows: "Testimony has been given in respect to the value of this property; not the value of the property at the time it was taken, but the highest value of this property at any time since the property was taken, to the present time. *If the plaintiff be entitled to recover, he is entitled to recover the highest value of the property within that period of time, from the time it was taken to the present time.*" To this instruction the defendants duly excepted.

After a careful consideration of the decisions of this court upon the question as to the rule of damages in actions of this

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kind, and an examination of a large number of cases decided by the courts of other states in this country, and by the courts of England, we are satisfied that the rule as laid down by the learned circuit judge is not sustained by the weight of authority, and that it ought not to be adopted by this court upon principle. We think the rule adopted by the circuit court would in many cases work great injustice, and violate the rule that compensation for the plaintiff's loss is the true rule of damages in all cases in which he is not entitled to exemplary damages.

As it is urged by the learned counsel for the respondent that the circuit judge was constrained to give this instruction as to the measure of damages, upon the authority of the decisions of this court, it is but just that a full examination of the cases in this court should be had. As this court is now constituted, we would hesitate to set aside a rule of law which can fairly be said to have received the deliberate sanction of the court, in a case or series of cases calling for the settlement of such rule of law.

The first rule laid down by this court as to the measure of damages, and which is sustained by a large number of cases, is that the damages for which the plaintiff may recover must be the legal, natural and proximate consequences of the act complained of; and this rule is equally applied to actions for the breach of contract and for torts. *Vedder v. Hildreth*, 2 Wis., 427; *Brayton v. Chase*, 3 Wis., 456; *Bradley v. Denton*, id., 557; *Gordon v. Brewster*, 7 Wis., 355; *Oleson v. Brown*, 41 Wis., 413; *Stewart v. City of Ripon*, 38 Wis., 584. This rule is so well settled, both in this and all other courts, that it is unnecessary to cite other cases to sustain the same. This rule is only qualified, in this court, where the act complained of is of such a nature as to entitle the plaintiff to recover exemplary or punitive damages, in addition to compensatory damages.

It is unnecessary to cite cases either in this or other courts

to sustain the universal rule of law, that the plaintiff is entitled to recover only compensatory damages, except in the cases above stated, when, under the decisions of this and some other very respectable courts, the plaintiff may recover exemplary or punitive damages.

The great controversy in the decisions and in the courts is as to what are and what are not compensatory damages, all the courts holding to the rule that compensation is the true measure of the damages to be recovered, except where exemplary damages are allowed; and, although there may have been some slight deviation and some *dicta* suggesting a different rule, the uniform current of opinion in this court has been, that in actions for the tortious conversion of chattels, or for a breach of contract by the nondelivery thereof, in the absence of any proof of circumstances showing that the plaintiff has suffered other specific and particular damages which were the natural and proximate result of the tort or breach of contract, the measure of damages is the value of the property at the time of the conversion, or at the time when the same was to be delivered, with interest thereon from such date to the day of trial. In this court, the rule above stated has been approved in the following cases:

Ainsworth v. Bowen, 9 Wis., 348, was an action for the conversion of a school land certificate, and the court say, Justice COLE delivering the opinion: "The measure of damages would be the value of the certificate at the time of such conversion." *Nudd v. Wells*, 11 Wis., 407, was an action against a carrier for the nondelivery of goods according to his contract. Justice PAINE, delivering the opinion of the court, says: "The general rule as to damages for nondelivery of goods by a common carrier is the value of the goods, with interest from the day when they should have been delivered;" citing Sedgwick on Damages as his authority for the rule. *Meslike v. Van Doren*, 16 Wis., 319. In this action an attachment had been issued by the plaintiff, and a quantity of wheat belonging

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to the defendant had been seized thereon. The attachment had been dissolved upon a trial upon the traverse of the affidavit; and the question was, what damages the defendant should recover against the plaintiff for the taking and detention of the wheat upon the attachment. Justice COLZ, delivering the opinion, says:

"The testimony showed that wheat bore about the same market value when seized upon the attachment as when redelivered to the defendant. In the intermediate period it appears that there was a considerable rise in the price for a day or so. The defendant claimed that he should have the benefit of this rise in the value, although he did not show that he could or would have sold at that price. He was, of course, entitled to recover damages for any loss which he had sustained in consequence of being deprived of the use and control of his property during the pendency of the attachment, or for any injury thereto or loss thereof. . . . These damages the jury were directed to allow him under the rule laid down by the court; but to have permitted him to recover the difference between the highest market value of the wheat at any time during the pendency of the attachment, and the value when redelivered to him, without giving any testimony that he could or would have availed himself of that opportunity to sell, it seems to us would have been erroneous. Such a rule would be giving damages for injuries which the party had never sustained."

Noonan v. Isley, 17 Wis., 314, was an action to recover the value of \$300 of Watertown Railroad stock, which was agreed to be delivered on a certain day; and it was held that the measure of damages was the value of the stock on the day it was to be delivered, and interest thereon to the day of trial. In *Tenney v. State Bank of Wisconsin*, 20 Wis., 152, Chief Justice DIXON, in delivering the opinion of the court, says: "In cases of the conversion of personal property, the value of the property at the time of the conversion, with interest, by

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way of damages, to the time of recovery, has always been considered a just and adequate compensation. If Inbush had taken the vessel without any legal right, and converted it with no circumstances tending to show malice, or if he had destroyed it by an act of negligence, the rule of damages would have been the value and interest." *Flick v. Wetherbee*, 20 Wis., 392. *Pickering v. Bardwell*, 21 Wis., 562, was an action against a vendee of a quantity of wheat, which he had purchased and agreed to take at a fixed time. The vendee refused to take the wheat and pay the price agreed upon. The vendor, after tendering the wheat, kept the same some fifteen months, and then sold it for a much less price than the defendant had agreed to pay for the same, and claimed as his damages the difference between the price for which it was sold and the price agreed to be paid therefor by the defendant, and interest. The court say:

"Now the plaintiff kept the wheat in this case some fifteen months after the default of the defendant. It appears that the wheat might have been sold soon after the defendant failed to accept and pay for it; and, in the most favorable view which can be taken of the case for the plaintiff, he ought only to recover the difference between the contract price and the market value of the wheat *at about the time the defendant should have received it*. Perhaps the plaintiff might wait a short time after the expiration of the fifteen days, to see whether the defendant would receive the wheat as he said he would; but certainly he could not wait fifteen months, until the condition of the market was entirely changed, and then sell, and call upon the defendant to make up the deficiency between the contract price and the one realized."

In *Bonesteel v. Orvis*, 22 Wis., 522, which was an action of replevin for a stock of merchandise, the court say: "The proper rule of damages is to ascertain the value of the goods at the time they were taken from the possession of the plaintiffs, that is, their market value — the sum for which they could

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be sold at that place,— and to allow plaintiffs this amount, with interest thereon. . . . And in ordinary cases the amount of damages which the owner is entitled to recover for goods wrongfully taken from his possession, is the market price, with interest thereon. As a general rule this is deemed in law a compensation for the loss he has sustained, and this court has laid it down in a number of cases as the proper measure of damages.” In *Biglow v. Doolittle*, 36 Wis., 115, the court say: “Were this an action of trover, the rule of damages would be the value of the property when seized, and interest thereon to the time of trial.”

The only cases in this court which intimate that a different rule of damages should prevail, are the cases of *Weymouth v. The C. & N. W. Railway Co.*, 17 Wis., 550, and *Webster v. Moe*, 35 Wis., 75.

In the case of *Weymouth v. Railway Co.*, the only contention was, whether the rule of damages should be the value of the property at the place where the defendant took it, or its value at the place to which it was carried by the defendant, which in that case was much greater than at the place where it was taken. The action was replevin. The court held that the plaintiff's damages, in case a return of the property could not be had, was the value at the place of taking, with interest, and not the increased value which had been added to it by the labor of the defendant. Incidentally, in his opinion, Justice PAINE says: “The value of the property at the moment of conversion, with such increase as it may have received from fluctuations of the market, or other causes independent of the acts of the defendant, should be the measure of damages.” That this remark as to the rule of damages was not understood by the court as qualifying the general rule which had been laid down in the cases above referred to, is evident from the subsequent decisions in the cases of *Single v. Schneider*, 24 Wis., 299; *Hungerford v. Redford*, 29 Wis., 845; and *Single v. Schneider*, 30 Wis., 570. In the case in the 24 Wis., 299, it

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was said that the rule of damages in the action of replevin was the difference between the whole value of the article when replevied, and the addition to its former value made by the defendant's labor. In the case in the 29 Wis., 345, it was held that when the defendant cut the logs in good faith, believing that the land was his, the damages would be the value of the stumpage or standing timber, with interest; and in 30 Wis., 570, it was held that the measure of damages was the value of the stumpage, even when the defendant knew that he was a trespasser at the time he cut the logs.

Although the last two cases fix no time at which the value of the stumpage should be estimated, it may be inferred that they were intended to follow the rule laid down in the case of *Weymouth v. Railway Co.* and *Single v. Schneider*, 24 Wis., 299, *supra*; that is, that in a case of replevin, when the chattels were in the possession of the defendant at the time the action was commenced, and presumably when the same was tried, the plaintiff may, if he recover and cannot obtain possession, recover as his damages the value of the chattels at the time the same were converted, with interest; or, in lieu thereof, the value of the same at the time of the trial, excluding such additional value as shall have been added thereto by the labor of the defendant.

It will be seen by an examination of the language used by Justice PAINE, that he does not give sanction to the rule that the plaintiff may recover as his damages the highest market value at any time intermediate the tortious taking and the day of trial, but that he may recover its value at the time of its conversion, and such increase as it may have received from fluctuations of the market or other causes independent of the acts of the defendant. The increased value here spoken of is the increased value from such causes at the time of the trial, and not such as it may have had at any intermediate period. This construction makes all the cases in replevin above cited harmonize, and is not in any way inconsistent

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with the other rule, that in actions to recover damages for the conversion of chattels the value at the time of conversion, with interest, is the measure of damages. In cases of the latter kind, it is immaterial whether the property is in existence, or even in the hands of the defendant at the commencement of the action or at the time of the trial. In the case of replevin, ordinarily, the property is in the hands of the defendant when the action is commenced, and is supposed either to be in his hands or in the hands of the plaintiff at the time of the trial. If it be in the hands of the plaintiff, the question of damages as to the value of the property does not arise unless the defendant recovers; and if it be in the hands of the defendant and the plaintiff recovers, as the title has always been in him and is still in him, the defendant ought not to be permitted to retain the same, in case it is then worth more than at the time of the conversion, when such increased value is attributable to other causes than the labor and money spent on the same by the defendant, without paying the plaintiff such increased value; and this is the extent to which these cases go.

The general rule as to the measure of damages established by these cases in the action of replevin, where the property is still *in esse* and in the hands of the party committing the wrong, is the value of the property at the place where the same was taken, at the time of the trial, whether such value be greater or less than it was at the time of the taking, excluding any value added by the labor or money of the wrongdoer; and when such value is less than the value at the time of the taking, for any cause, the party may also recover, as damages, the difference between such values, in addition to any special damages he may have sustained by the loss of the use of the same during such time.

After the last decision in the case of *Single v. Schneider* was made, the legislature, undoubtedly supposing the rule laid down in that case was likely to be a source of injustice towards those who owned pine lands, and had invested their

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money in such lands as permanent investments, passed the law of 1873, prescribing a different rule of damages against persons who wrongfully and willfully cut and carry away logs and timber which do not belong to them.

This act, however, carefully follows the rule of damages laid down by this court in actions of tort for the recovery of damages for the conversion of chattels, even in actions for cutting timber, by allowing the defendant to allege that the cutting was done by mistake, and tender the value of logs at the time the same were cut, with interest to the date of such tender and ten per cent. additional, with costs. And such tender becomes a full defense to the action, if the jury find on the trial that the cutting was by mistake, and that the tender was the full value of the logs at the time of the cutting, with the interest and the penalty of ten per cent. The ten per cent. added in this case we consider as very much in the nature of a penalty, although not strictly so.

The case of *Webster v. Moe*, 35 Wis., 75, was tried after the passage of this law, and the decision was based wholly on the fact that, in actions for cutting logs, the legislature had fixed a rule of damages, and although that action was commenced before the act was passed, yet, in deference to the legislature, the court applied the legislative rule to the case. It would therefore be a perversion of the language used in that case to hold that the court intended to establish a general rule contrary to the whole course of decisions in the court from the time of its first organization.

It certainly cannot be said that this court has in any case decided that, either in actions for the nondelivery of chattels according to agreement, or in actions to recover damages for the conversion of the same, the plaintiff may recover as damages the highest market value of the chattels at any time intermediate the time when they should have been delivered according to contract, or the time when they were converted, and the day of trial. On the other hand, we think the

uniform course of decision is, that the measure of damages is the value of the property at the time fixed for the delivery, or at the time of the conversion, with interest to the day of trial; the only exception to the rule being that in case of replevin, where the property is *in esse* and supposed to be in the hands of the defendant at the time of the trial, if plaintiff recovers, he may recover as his damages the value of the property on the day of trial, excluding any value added to the same by labor or money of the defendant or those under whom he claims.

If the question were open for consideration in this court, and we were at liberty now to fix a rule of damages in cases like the one at bar, we should feel constrained to fix the one which has already been established by this court. It is said that the rule giving as damages the highest market value intermediate the conversion or day of delivery and the day of trial, should be applied to articles of trade and commerce which fluctuate in value from day to day; and that to adhere to the rule of value at the time of the conversion would in many cases allow the wrongdoer to make profit out of his own wrong, or at all events it might prevent the plaintiff from taking advantage of a rising market, and thereby might deprive him of his reasonable expectations of profit from his investments.

There can be no force in the argument that the defendant would be allowed to make money out of his own tortious act. If the wrongdoer sells the property which he has unlawfully taken from another, the owner of the property can waive the tort and sue the tortfeasor for the money he has received upon such sale of his property, and thereby prevent him from making a profit out of his wrong. But the rule which allows the plaintiff to recover the highest market value is objectionable, because it allows him to recover speculative damages, especially when a long time elapses between the conversion and the day of trial. In most cases property which rapidly changes in value is not retained in the possession or owner-

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ship of one person for a great length of time, and it would be a matter of the utmost doubt whether the plaintiff, had he not been deprived of the possession of his property, would have realized the highest market value to which it might have attained during the time of the conversion and the time of trial; and in those cases where the market value is very fluctuating, great injustice would be done by this rule to the man who honestly converted such property, in the belief that it was his own, if, after the lapse of five or six years, he should be called upon to pay the highest market value it had attained during that time. The hardship of enforcing this rule in the case of stocks, which is perhaps property of the most unfixed value, forced the court of appeals in New York to repudiate the rule, after it had been partially adopted by the courts of that state. See *Baker v. Drake*, 53 N. Y., 211; *Bank v. Bank*, 60 N. Y., 42.

The difficulties and injustice of the rule of the highest market price has led to various modifications of it by the courts which have adopted it; some courts having so modified it as to confine it to the highest price between the date of conversion and the commencement of the action; others to the time of commencement of the action, provided the action be commenced within a reasonable time; and others between the time of conversion and the time of trial, provided the action be commenced within a reasonable time. In California, where the courts had been holding to the rule of the highest market value, in the case of *Page v. Foster*, 39 Cal., 412, when under this rule the plaintiff had recovered the sum of \$25,763 for a quantity of hay which, when taken by the defendant, was worth only the sum of \$2,500, after an elaborate discussion of the case and reference to a large number of authorities, the court finally settled down upon the rule that the plaintiff might recover the highest market price to which the property might attain *within a reasonable time after the property had been taken, with interest computed from the time such value was estimated to the day of trial.*

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Mr. Field, in his work upon the Law of Damages, after an examination of all the cases, says: "The rule of valuation of the property at the time of the conversion, with interest, prevails in Massachusetts, where there is no claim for special damages; and this general rule has been recognized in Pennsylvania, Kentucky, Missouri, West Virginia, New Hampshire, Connecticut, Maine, Vermont, Illinois, Wisconsin, Louisiana, Mississippi, Nevada, Florida, Delaware, Maryland, Minnesota, New York, Texas and Iowa." Field on the Law of Damages, 629, 630, and cases there cited. Sedgwick, in his work on Damages (6th ed.), p. 591, says: "On principle the value at the time of the conversion should control, unless the plaintiff is deprived of some special use of the property anticipated by the wrongdoer." "It appears to me that, upon principle, unless the plaintiff has been deprived of some particular use of his property of which the other party was apprised, and which he may be thus said to have directly prevented, the rights of the parties are fixed at the time of the illegal act, be it refusal to deliver or actual conversion, and the damages should be estimated as at that time."

The rule as above stated by Sedgwick has not only been adopted by the courts of the several states above mentioned, but it is undoubtedly now the rule in the English courts. In the case of *France v. Gaudet et al.*, L. R., 6 Q. B., 199, decided in 1871, it was held that in an action for the conversion of a quantity of champagne the plaintiff was entitled to recover the value at the time of the conversion, with interest, and that the fact that he had made a bargain to sell the same at a specified price to a solvent customer, was evidence of its value, there being no other in the market of the same quality to be procured at that time. Justice MELLOR, who delivered the opinion, says: "We are of the opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion, and that a *bona fide* sale having been made to a solvent customer at 24 shillings per dozen, which would have been

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realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired an actual value of 24 shillings per dozen; and we think that, in the present case, that ought to be the measure applied;" and in another place he says: "The conversion consists in withholding from another, property to the possession of which he is immediately entitled, and the circumstances which affix the value are then determined."

The rule fixing the measure of damages in actions for breaches of contract for the delivery of chattels, and in all actions for the wrongful and unlawful taking of chattels, whether such as would formerly have been denominated *trespass de bonis* or trover, at the value of the chattels at the time when delivery ought to have been made, or at the taking or conversion, with interest, is certainly founded upon principle. It harmonizes with the rule which restricts the plaintiff to compensation for his loss, and is as just and equitable as any other general rule which the courts have been able to prescribe, and has greatly the advantage of certainty over all others.

We have concluded, therefore, to adhere to the general rule laid down by this court in the cases cited, and hold that in all actions, either upon contract for the nondelivery of goods, or for the tortious taking or conversion of the same, "unless," in the language of Sedgwick, above quoted, "the plaintiff is deprived of some special use of the property anticipated by the wrongdoer," and in the absence of proof of circumstances which would entitle the plaintiff to recover exemplary or punitive damages, the measure of damages is, *first*, the value of the chattels at the time and place when and where the same should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of trial; *second*, if it appears that the defendant, in case of a wrongful taking or conversion, has sold the chattels, the plaintiff may, at his election, recover as his damages the amount for which the same were sold, with interest from the time of the sale to the

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day of trial; *third*, if it appears that the chattels wrongfully taken or converted are still in the possession of the defendant at the time of the trial, the plaintiff may, at his election, recover the present value of the same at the place where the same were taken or converted, in the form they were in when so taken or converted.

These rules will prevent the defendant from making profit out of his own wrong, will give the plaintiff the benefit of any advance in the price of the chattels when defendant holds possession of the same at the time of the trial, and on the whole will be much more equitable than the rule given by the court below. It will be understood that we do not intend that these rules shall apply to cases which come under the provisions of chapter 263, Laws of 1873, now section 4269, R. S. 1878, or under the provisions of any other statute which may prescribe the damages which may be recovered in a given case.

The evidence is not sufficiently clear to justify this court in fixing the value of the grain and hay at the time the same were converted by the defendant, and we are unable, therefore, to direct that the verdict may stand for the balance, if the plaintiff shall remit a certain amount of the damages recovered, and that judgment may be entered for such balance; but, as there seems to be no probable defense to the action, it will be an easy matter for the parties to agree upon the damages which the plaintiff will be entitled to recover under the rule established by this opinion, and thereby avoid the necessity and expense of a new trial; and we must leave that matter to the discretion of the parties.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial.

Otis vs. The Town of Janesville.

OTIS VS. THE TOWN OF JANESVILLE.

CONTRIBUTORY NEGLIGENCE: (1) *Of driver of private conveyance.* (2) *"Slight want of ordinary care."*

1. Contributory negligence of the driver of a private conveyance in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured, to prevent a recovery.
2. In an action for injuries caused by negligence, the court, after charging that "slight negligence" (which means in the law a want of extraordinary care) would not prevent a recovery, but that a "want of ordinary care" would do so, if it "contributed in any material degree to produce the injury," refused to charge that a "slight want of ordinary care," in consequence of which the injury occurred, would have that effect. *Held*, misleading and therefore error.

APPEAL from the Circuit Court for *Walworth* County.

Action for injuries to the person alleged to have been caused by a defective highway. It appeared that plaintiff and several other persons, at the time of the accident, were riding along the highway in a private conveyance drawn by a horse which was driven by one of the party; and defendant sought to show, among other things, that the accident was caused by negligence in driving.

The defendant appealed from a judgment in favor of the plaintiff.

The cause was submitted on the brief of *Winans & McElroy* and *Bennett & Sale* for the appellant, and that of *Pliny Norcross* and *Cassoday & Carpenter* for the respondent.

ORTON, J. The injury of the plaintiff occurred by being thrown from a conveyance driven and managed by another, whose negligence, if any there was, must be imputed to her. *Prideaux et ux. v. The City of Mineral Point*, 43 Wis., 513. Such negligence, therefore, was a very material question in the case, and should have been very clearly and fully submitted

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to the jury, by instructions not liable to any doubt or uncertainty. The distinction between *slight negligence* and *slight want of ordinary care* may be clear enough to a lawyer, but not so clear to those not educated in the law.

If slight negligence of the plaintiff would prevent a recovery, then he would be held to the highest degree of care, when, in law, he is chargeable only with the exercise of ordinary care, and is prevented from a recovery by the want of it in any degree, however slight. The jury were properly instructed that slight negligence would not prevent a recovery, and the want of ordinary care would do so. *Cremer v. Town of Portland*, 36 Wis., 92; *Hammond v. Town of Mukwa*, 40 Wis., 35. But the learned judge omitted to qualify this general instruction with the word *slight*, leaving it to be inferred that the entire absence of ordinary care, or the want of the highest degree of ordinary care only, would prevent a recovery, and at the same time added the qualification that such neglect to use ordinary care "contributed in any material degree to produce the injury."

This qualification alone, although well calculated to confuse the jury, and liable to be understood as meaning that such want of ordinary care must be something greater and more *material* than slight to prevent a recovery, might not be strictly erroneous; but when so given in connection with the charge that slight negligence of the plaintiff would not prevent a recovery, and with the omission or refusal to charge distinctly and unqualifiedly that, "if the jury find from the evidence that Charles E. Wheelock [the driver], on the occasion in question, failed to exercise even a slight want of ordinary care, in consequence of which the plaintiff was thrown from the wagon and was injured, then the plaintiff is not entitled to recover," then it is quite clear that this qualification misled the jury as to this distinction between slight negligence and slight want of ordinary care. We think the instruction, as asked in the above language, should have been given, because

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it was strictly good law, and because, also, no equivalent instruction had been given in the general charge. For this refusal to so charge, under the circumstances, we think the judgment should be reversed.

We are inclined to the opinion, after a careful examination and review of all the evidence, that Wheelock, the driver, was guilty of a want of ordinary care in driving and managing the wagon at the time and place, and under the circumstances.

The speed with which he drove the team over the hill and down the declivity to the defect in the highway which caused the wagon to upset, when he had long known of this defect, is a strong circumstance in support of such opinion; but we do not reverse the judgment upon that ground, and we leave the plaintiff to proceed further as she may be advised. *Haas v. The C. & N. W. R'y Co.*, 41 Wis., 50.

By the Court.—The judgment of the circuit court is reversed, with costs, and the cause remanded for a new trial.

WHITE vs. HALE.

(1) *Contract or tort?* (2) *Right to costs in circuit court.*

1. An action for damages for breach of warranty where the complaint contains no charge of fraud or deceit, is an action *on contract*, and not one sounding in tort.
2. Where, in such an action, brought in the circuit court, plaintiff claims over \$200 damages and recovers less than \$50, he may recover *taxable costs* at the discretion of the court. Subd. 7, sec. 2918, R. S.

APPEAL from the Circuit Court for *Racine* County.

This action was brought to recover damages for an alleged breach of warranty. The complaint (duly verified) avers that, "the plaintiff wishing to buy, and the defendant offering to sell this plaintiff a certain horse, warranted and represented

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said horse to be all right, sound, kind and true and gentle, and quiet in harness, and good every way to work and use;" that the plaintiff, "relying upon said warranty and representations, then and there purchased said horse, and paid the defendant his note therefor," for \$115 with interest; that, "at the time of said warranty and sale, the horse was unsound, unkind and untrue, and balky and restive, and ungovernable in harness, and had a disease of his limbs, was lame and had been foundered, was unable to work, and of no use whatever, and utterly worthless, and was in fact not worth anything or any sum whatever, and the whole price paid less than the defendant represented and warranted him; and that said horse still so remains." Special damages in the sum of \$250 are alleged, and judgment for \$350 is demanded. The answer denies the warranty.

Upon trial of the cause, the jury found for the plaintiff, and assessed his damages at \$45.97. The clerk thereupon taxed the costs in favor of the plaintiff, and refused to tax defendant's costs. On appeal, the court affirmed the taxation, and gave judgment for the plaintiff for the damages assessed by the jury and full costs. If plaintiff is entitled to costs, it is conceded that they are taxed at the true amount.

The defendant appealed from that part of the judgment which awarded costs to the plaintiff.

The cause was submitted for the appellant on the brief of *J. V. V. Platto*.

J. T. Fish, for respondent.

LYON, J. The learned counsel for the defendant assumes that the action sounds in tort, and that the defendant is entitled to costs under section 2920 and subdivision 5 of section 2918, R. S. Were this an action of tort, his position would be correct. But it is not such an action. Although the complaint seems to have been originally drawn charging a fraudulent warranty, it has been amended by striking out everything

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which tends to charge fraud or deceit; and as it now stands it states a cause of action *ex contractu*, and not *ex delicto*. The action being upon contract, the demand in the complaint exceeding \$100, and the complaint being duly verified, the case is ruled by subdivision 7 of section 2918, which, in a case like this, gives the plaintiff such costs as the court in its discretion may allow. In the exercise of that discretion the circuit court has given the plaintiff full costs.

The testimony has not been preserved, and there is nothing in the record which authorizes us to say that the allowance of such costs was an abuse of discretion; hence we cannot disturb the judgment. See *Power v. Rockwell*, 39 Wis., 585.

By the Court.—The judgment of the circuit court is affirmed.

LYNES and another vs. ELDRÉD.

CHANGE OF VENUE, for convenience of witnesses, etc.

The determination of a motion for a change in the place of trial, to promote "the convenience of witnesses and the ends of justice," rests largely in the discretion of the circuit court; and in this case no sufficient reason appears for reversing an order denying such a motion.

APPEAL from the Circuit Court for *Milwaukee* County.

The cause was submitted for the appellants on briefs of *W. H. Webster*. For the respondent, there were briefs by *Jenkins, Elliott & Winkler*, and oral argument by *Mr. Winkler*.

COLE, J. This is an appeal from an order denying an application to change the place of trial of this action from Milwaukee to Oconto county, on the ground that the convenience of witnesses and the ends of justice would be promoted by the change. A motion for a change on this ground was first made in March, 1878, when the motion was denied, but without prejudice to the plaintiffs' right to renew it. In October following the motion was renewed, when it was denied, "on the

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ground of laches in the plaintiffs in not moving sooner, upon defendant filing with the clerk of this court the stipulation offered relative to the defendant paying the fees of plaintiffs' witnesses mentioned in the affidavit of plaintiffs used on said motion."

The affidavits upon which the respective motions were founded, state essentially the same grounds for the change. In opposition to the last motion the defendant filed his affidavit, wherein he states that several witnesses, whose names are mentioned, were necessary and material witnesses, without whose testimony he could not safely proceed to trial; "that all of said witnesses are ready and willing to attend the trial of the cause in Milwaukee county; and that the defendant intends to procure their attendance;" further, that he could not obtain a fair and impartial trial of the cause in Oconto county, for reasons which he gives.

We have thus alluded to the various proceedings in this case for the purpose of showing that we would not be justified by anything appearing in the record, in reversing the order, even if we thought that the court below denied the change for a wrong reason. We are by no means clear that the second motion was not properly denied on account of the plaintiffs' delay in making it. But we shall not go into that question. It is sufficient to say that the granting or denying of the motion was a matter resting largely in the discretion of the court below, and we cannot say that that discretion was abused under the circumstances. We attach no importance to the stipulation relative to paying the expenses of securing the attendance of plaintiffs' witnesses, upon which the court below seems to have laid some stress.

The learned counsel for the defendant insisted that the order was not appealable. Without, however, discussing the point at this time, we remark that appeals from such orders have heretofore been entertained without question.

By the Court.—The order of the circuit court is affirmed.

Gutwillig vs. Stumes.

GUTWILLIG VS. STUMES.

PROMISSORY NOTES: (1) *Rights of indorsee as against subsequent acts and declarations of indorser: Evidence: Presumption as to date of indorsement.*

APPEAL TO SUPREME COURT. (2) *Waiver of right to a new trial.*

1. In an action upon two promissory notes, by a second indorsee, after the notes, duly indorsed, had been put in evidence, the evidence for defendant was, that after one of the notes fell due, and before maturity of the other, the payees attended a meeting of the maker's creditors to consider the question of a compromise, and stated the amount of their claim, including the notes in question; that several days afterwards a compromise in writing was signed by said payees and other creditors, by which they agreed to take forty per cent. in discharge of their claims, in case all the creditors should sign the agreement; but said payees did not at that time state the amount of their claims. One of the payees then testified for plaintiff, that they sold and delivered the notes to the first indorsee one or two days before the date of the written compromise, for about 70 per cent. of their face. There was no evidence that such payees had agreed with the other creditors, or with defendant, to sign the compromise, before they actually signed it. *Held,*

(1) That independently of the evidence, the *presumption* was that the notes were negotiated before due.

(2) That the compromise signed by the payees *after* negotiating the notes did not affect the rights of the purchaser or his indorsee.

(3) That subsequent *declarations* of the payees that they held the notes at the time of signing the compromise, would not be admissible in evidence against plaintiff.

(4) That the failure of the payees to disclose the fact that they had negotiated said notes, at the time of signing the compromise, did not throw upon plaintiff the burden of showing that he purchased in good faith and for value; such notes being valid against defendant for their full amount even in the hands of the payees, at the date of their negotiation.

[(5) That an oral agreement by the payees, before the negotiation of the notes, to sign the compromise of their entire claim, including such notes (if made, and if binding in law), would not have defeated plaintiff's right to recover the whole amount of the note negotiated *before maturity*, without knowledge on his part of such agreement; nor would it have thrown upon him the burden of proving the absence of such knowledge.]

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- (6) That upon the evidence plaintiff was entitled to recover the full amount of both notes.
2. When a motion for a new trial has been granted, the moving party may waive his right under the order, without prejudice to his right to appeal from the judgment afterwards entered.

APPEAL from the Circuit Court for *Milwaukee* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action was brought to recover the amount due upon two promissory notes given by the defendant to Heller, Bro. & Co. or order, both dated August 14, 1877, for \$271 each; one payable in forty days, and one in sixty days after date. Plaintiff introduced the notes in evidence, duly indorsed by the payee and one L. M. Kohn, and rested his case.

"The defendant, as a defense to the action, was permitted to show that he made a compromise with his creditors by which they all agreed to take forty cents on the dollar of the amount of their claims, to be paid in thirty days after the date of the compromise; that the compromise was in writing, and signed by all the creditors, including Heller, Bro. & Co. (except L. M. Kohn and the plaintiff, if they or either of them were creditors at the date of the compromise). The date of the compromise was October 13, 1877. Heller, Bro. & Co. placed no amount opposite their signature. There was evidence that Simon Heller, of the firm of Heller, Bro. & Co., was at a meeting of the creditors of *Stumes* several days before the 13th of October, 1877. At this meeting Heller claimed that they were creditors of *Stumes* for something over \$700, and the notes in question constituted a part of said amount. When afterwards asked why he did not put down the amount of his claim, he stated that he did not care to have it advertised all over town how much *Stumes* owed him, or any one else who had failed. There does not appear to be any evidence that Heller said he was a creditor to the amount of \$700 or more at the time he signed the com-

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promise paper. The compromise paper was conditioned that it should not be binding unless signed by all the creditors.

"All the evidence on the part of the defendant was received under objection, and when the defendant closed, the plaintiff moved to strike out the testimony on the part of the defendant, on the ground that it did not make out, or tend to make out, a defense to the plaintiff's action. The motion was denied, and the plaintiff excepted.

"Simon Heller was then sworn on the part of the plaintiff, and testified that he sold and delivered the notes in question to L. M. Kohn, on the twelfth of October, 1877; that the consideration for the sale was \$375; that the compromise paper was first handed to them for signature two days after the sale, and one day after the notes were delivered to Kohn; and that at the time he signed the compromise paper *Stumes* owed them about \$200, the amount of book account. Heller swore that he did not attend the meeting of creditors when any agreement was made as to compromise; that he came to the meeting, but went away before anything was done, and did not know that it was proposed to compromise at forty cents on the dollar. The defendant also proved that he had tendered Heller, Bro. & Co. forty cents on the dollar for his whole claim, including these notes.

"Under the instructions of the court, the jury returned a verdict for the plaintiff, for \$216.82."

From a judgment on the verdict, plaintiff appealed.

The cause was submitted for the appellant on briefs of *Carpenter & Smiths*.

For the respondent, there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *Mr. Winkler*.

TAYLOR, J. We are of the opinion that the verdict is entirely unsupported by the evidence given on the trial. We find no evidence of any agreement made by Heller, Bro. & Co. either with *Stumes* or the other creditors to sign the com-

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promise paper, until he signed the same; nor is there any evidence that when they signed it, they declared that they were creditors to the amount of \$700.

All the evidence, presumptive and direct, relating to the time when the notes were transferred to Kohn, shows that they were transferred before the compromise papers were signed. The presumption of law arising from the mere production of the notes is, that they were both negotiated before they became due; and the positive proof shows that one was negotiated after it was due, and the other before. As the evidence does not show that Heller, Bro. & Co. had made any agreement to sign the compromise papers until after the notes were both sold, the signature of such agreement after the sale was made could not affect the rights of the purchaser, even as to the note that was past due, and no act or declaration of Heller, Bro. & Co., after the notes appear to have been transferred to Kohn, could in any way change the rights of Kohn or his indorsee. If the jury were justified in disbelieving the evidence of Heller, I cannot see that the presumption of the law, that the notes were transferred before they became due, was overcome in any way by the evidence of the witness Heller; and, neither Kohn nor *Gutwillig* having signed such compromise, they are not bound by it, and are entitled to recover the whole amount due on the notes, unless it can be shown that the plaintiff holds the notes as a mere trustee for the firm of Heller, Bro. & Co.

When the plaintiff had made out a presumptive right to recover, upon the production of the notes in court, properly indorsed, no mere declaration or admission of Heller not made as a witness in the trial could destroy such right. In order, therefore, to destroy the plaintiff's right to recover, it was incumbent on the defendant to show, by affirmative proof, that the notes were not sold and transferred by Heller, Bro. & Co. before the signature by them of the compromise paper; and proof that Heller, Bro. & Co. had stated or admitted that

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they held these notes at the time of the signature of the compromise paper could not be admitted as evidence of the fact against the plaintiffs.

Upon the evidence, as it stood when the defendant rested his defense, the plaintiff was clearly entitled to ask the court to direct a verdict in his favor for the amount of both notes. The defendant had not, as I understand the evidence, shown that Heller, Bro. & Co. had agreed to sign the compromise papers for the whole amount of their claims, including the notes, nor that they held the notes when they did in fact sign the same. The defendant knew their signature was not accompanied with a statement of the sum they then claimed as due them; and the only bad faith which could be attributed to them was, that they concealed the fact that they had in fact parted with the notes. This fact did not, we think, change the burden of proof, and require the plaintiff to show that he purchased the notes in good faith and for a valuable consideration.

The notes, having been transferred to Kohn before Heller Bros. signed the compromise papers, and before they had made any agreement to sign, were, at the time of the transfer, and in the hands of Heller, Bro. & Co., valid notes against the defendant for their full amount; the payees could have maintained an action upon them for the full amount thereof; and nothing which appears to have been done by them up to that time would have defeated such action. Having transferred the notes whilst the rights of the payees were in no way impaired by anything then done by them, the indorsee took them with such right of recovery unimpaired, and nothing thereafter said or done by the payees could impair such right. But, had it been proved that Heller, Bro. & Co. had agreed orally with the other creditors to sign the compromise papers for their entire claim, including the notes, and had afterwards signed the compromise agreement in the manner they did, such oral agreement on the part of the payees, ad-

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mitting the same to be binding in law upon them, would not defeat the plaintiff's right of action for the whole amount of the note which was not due at the time the same was transferred to him or his immediate indorser, unless knowledge of such agreement had been brought home to him at or before the time he took transfer of the note; nor do we think that such evidence would be sufficient to cast the burden of proof upon the plaintiff, of showing that he had no notice of such agreement at the time he purchased the note. *Reeve v. Ins. Co.*, 39 Wis., 520; *Catlin v. Hansen*, 1 Duer, 310; *Hart v. Potter*, 4 Duer, 458; *Ross v. Bedell*, 5 Duer, 462; *Kelley v. Whitney*, 45 Wis., 110-117; *Stevenson v. O'Neal*, 71 Ill., 314; *Howry v. Eppinger*, 34 Mich., 29-33; *Croft v. Bunster*, 9 Wis., 504; *Collins v. Gilbert*, 94 U. S., 753-760, 761.

As the whole evidence in this case shows that, at the time the notes were transferred to the plaintiff's immediate indorser, they were valid and existing claims for the full amount due and to become due upon them, we do not think the transfer of them was such a fraud upon either the maker or the other creditors of the maker, as should change the burden of proof, and require the plaintiff to show affirmatively, by positive proof, that he purchased them in the usual course of trade, for a valuable consideration.

In order to cast the burden of proof upon the holder of a promissory note, of showing that he paid value therefor, it is necessary that the defendant should show that the note or bill is founded in fraud, or was fraudulently put in circulation. See cases above cited, and *Smith v. Braine*, 16 Ad. & E., N. S., 250; *Bailey v. Bidwell*, 13 M. & W., 73; *Fitch v. Jones*, 5 El. & Bl., 238; *Harvey v. Towers*, 6 Exch., 660; *Hall v. Featherstone*, 3 Hurl. & Nor., 284; *Mills v. Barber*, 1 M. & W., 432; *Tucker v. Morrill*, 1 Allen, 528; *Sistermans v. Field*, 9 Gray, 331; *Brush v. Scribner*, 11 Conn., 390; *Smith v. Sack Co.*, 11 Wall., 139-147; *Noxon v. De Wolf*, 10 Gray, 343-347; *Ranger v. Cary*, 1 Met., 369-373.

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Upon the whole evidence in the case, we think the plaintiff was entitled to judgment for the face of the notes, and that the court erred in not directing a judgment for the plaintiff when the defendant rested his case, and in refusing the instructions asked by the plaintiff when the case was finally submitted to the jury.

It is urged that the appeal in this case should be dismissed because the plaintiff made a motion in the court below for a new trial, the court granted the motion and ordered a new trial upon the payment of ten dollars costs, and the plaintiff declined to pay the costs imposed, and thereupon judgment was rendered upon the verdict, and the plaintiff appealed to this court. It is urged that, as the only relief which the plaintiff can get in this court is a reversal of the judgment and a new trial, he should not be permitted to appeal from the judgment when the court below sets aside the verdict and grants a new trial. Without determining the question whether a party is justified in refusing to take the benefit of his motion because it is granted upon terms which he deems unjust, we are disposed to hold that, as a rule of practice, the party moving for a new trial may, after the same is granted, waive his motion without prejudice to his right of appeal from the judgment, if one be thereafter entered in the action. It may be for his interest that the questions in the case should be settled by this court before a new trial is had, as the settlement of the law of the case might do away with the necessity of a new trial altogether, or at least relieve the parties from the cost of litigating questions which it might otherwise be deemed necessary to litigate upon such new trial.

We are unable to see that any great evil can result from permitting the party moving for a new trial to waive the benefits of his motion; and when he does so, and judgment is entered upon the verdict, such waiver is certainly no bar to his right to appeal to this court from the judgment so entered, in order to review any errors which may have been committed upon the trial.

Bachmann vs. The City of Milwaukee. Vogel vs. Same. Steinauer vs. Same.

By the Court.—The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

BACHMANN VS. THE CITY OF MILWAUKEE. VOGEL VS. THE
SAME. STEINAUER VS. THE SAME.

CHANGE OF VENUE, for prejudice of the judge.

1. An affidavit merely in the words of the statute (R. S., sec. 2825), that the party making it "has reason to believe, and does believe, that he cannot have a fair trial of the action on account of the prejudice of the judge" (naming him), entitles such party to a change of the place of trial.
- [2. Whether perjury can be assigned upon such an affidavit, *quære*; but at least an assignment of perjury cannot be laid upon traverse of the fact of prejudice.]

APPEALS from the County Court of *Milwaukee* County.

While these actions were pending in the circuit court for Milwaukee county, the plaintiff in each case procured a change of venue to the county court of the same county, upon an *ex parte* application and an affidavit of the prejudice of the circuit judge. By the form of the affidavit, the plaintiff in each case declares "that he has good reason to believe, and does believe, that he cannot have a fair trial of said action in this court, on account of the prejudice of the Hon. David W. Small, judge of this court." Thereupon the defendant city appeared in the county court specially for the purpose, and moved in each case that the action be remanded to the circuit court, on the ground that said affidavit did not state facts sufficient to authorize the making of the order of the circuit court for a change of venue. From an order in each case denying such motion, the defendant appealed.

The appeals were submitted on the brief of *D. H. Johnson*, City Attorney, for the appellant, and that of *Jenkins, Elliott & Winkler* for the respondents.

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RYAN, C. J. The affidavit to change the venue in each of these cases follows the statute, could not properly do otherwise, and is sufficient. The venue is to be changed, not upon the fact of the judge's prejudice, but upon the imputation of it. *Van Slyke v. Ins. Co.*, 39 Wis., 390. And the statute, as it now stands, appeals to the conscience of the party for a reasonable apprehension, not for the truth of the fact on which the apprehension rests. It goes upon a statement of belief, not of fact, save in so far as belief may be a fact; upon assertion that the party has reason to believe and does believe that he cannot receive a fair trial on account of the judge's prejudice, not upon averment of the prejudice itself. *Carpenter v. Shepardson*, 43 Wis., 406.

It may be that perjury could not be well assigned on the affidavit. If so, the fault is in the statute, not in the affidavit which the statute prescribes. Certainly, an assignment of perjury could not be laid upon traverse of the fact of prejudice; and the brief of the learned counsel for the appellant is rather a criticism on the statute, than an argument of the insufficiency of the statutory affidavit to support the change of venue.

By the Court.—The order appealed from in each of these cases is affirmed.

THE STATE ex rel. THE NORTHWESTERN UNION RAILWAY COMPANY vs. SMALL, Circuit Judge, etc.

MANDAMUS. *Return to alternative writ construed.*

A petition for a *mandamus* to compel a circuit judge to make a further return on appeal, alleged that the petitioner took oral exceptions, on the trial, to the failure of the court to give certain instructions prayed by him. The judge's return to the alternative *mandamus* states that he rejected the instructions, substituting his own general charge, "to which action of the court no exception was taken," and further, that the bill of exceptions signed "fully and fairly states all the facts attending the trial, to the best of his knowledge, belief and remembrance." *Held, not evasive*, but a satisfactory return, and conclusive upon this court.

The State ex rel. The N. W. U. R'y Co. vs. Small, Circuit Judge, etc.

PETITION for a Writ of *Mandamus*.

On the relator's petition, an alternative writ of *mandamus* issued from this court addressed to *David W. Small*, Judge of the Second Judicial Circuit, commanding him to resettle the bill of exceptions in the case of *Diedrich v. The Northwestern Union Railway Company* (in which an appeal had been taken by the defendant company), by inserting the defendant's exceptions to the refusals of said judge to give certain instructions requested by the defendant, etc. The respondent having made return to the alternative writ, the relator moved that he be required to make a further return, upon grounds sufficiently stated in the opinion.

L. S. Dixon, for the motion.

F. W. Cotzhausen, contra.

RYAN, C. J. Some criticism was made on the failure of the learned circuit judge's return to the alternative writ, to meet immaterial statements in the relator's petition. Of these it is needless to take any notice.

The *gravamen* of the learned counsel's argument for a further return is, that the learned circuit judge does not explicitly deny a material averment of the petition, that the relator's counsel took oral exceptions to the failure of the circuit court to give certain instructions prayed for the relator. The argument appears to rest more upon verbal criticism of a particular passage in the return, than upon a fair construction of the whole.

The learned judge returns that he rejected the instructions, substituting his own general charge, "to which action of the court, no exception was taken." It is said that this statement is evasive. It is the action of the circuit court in giving or refusing an instruction, to which exception lies. It appears that no exception was taken to the charge actually given to the jury. If the learned circuit judge had returned that he rejected an instruction prayed by the relator, substituting his

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own charge, to which action of the court the relator excepted, this court could have no difficulty in issuing a peremptory writ to sign the exception. In either case this court owes too much respect to the circuit judges of the state to attribute to any of them evasion in the discharge of judicial duty upon a mere play upon words.

But whatever doubt acute verbal criticism could throw upon this passage in the return, is completely removed by the subsequent statement of the learned judge, that the bill of exceptions signed "fully and fairly states all the facts attending the trial, to the best of his knowledge, belief and remembrance."

Taken together, the two averments in the return are satisfactory to this court, and conclusive upon it.

By the Court.— Motion for further return denied.

THE STATE ex rel. SOUTHMAYD VS. SPOONER, Commissioner of Insurance.

INSURANCE COMPANIES. (1) *Duty of Commissioner of Insurance.* (2) *When license of foreign insurance company to be revoked.*

1. It is not the duty of the commissioner of insurance to prosecute insurance companies or their agents for penalties incurred by them under section 1974, R. S.
2. Said section 1974 provides that no corporation doing insurance business in this state, against which a final judgment shall have been recorded in any court of this state, shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy; and ch. 171 of 1879 requires the commissioner of insurance to revoke the authority of any foreign insurance company to do business in this state, upon its persistent violation of any law regulating such corporations. *Held*, that where, after judgment against a foreign insurance company in a lower court, it has in good faith taken an appeal and given the required undertaking for payment of the judgment if affirmed, it is under no obligation to pay the judgment pending the appeal, and the statutes cited do not apply.

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PETITION for a Writ of *Mandamus*.

On the relator's petition, an alternative writ of *mandamus* issued from this court on the 23d of September, 1879, addressed to *Philip L. Spooner, Jr.*, Commissioner of Insurance of this state. The writ recited that on the 3d of May, 1879, a final judgment for \$525.97 was rendered in the county court of Milwaukee county, in favor of the relator and against The Watertown Fire Insurance Company of Watertown, New York; that written notice of the entry of such judgment was given on the same day to the attorneys of record for said company in said action; that said company for a long time prior thereto had been, and for more than sixty days after the rendition of said judgment was, and still continued to be, an insurance corporation engaged in the business of insurance in this state, and since February 1, 1879, had been permitted to transact such business here under a license issued to it by this state; that said judgment remained unpaid for more than sixty days from the rendition thereof, and still remained wholly unpaid; that said company, after the expiration of said sixty days, issued, and was still issuing, new policies of insurance within this state; that the relator, on or about July 10, 1879, presented to the commissioner of insurance the certificate of the clerk of said county court that said judgment remained wholly unsatisfied of record, and that no appeal had been taken therefrom, with his (the relator's) own affidavit that no part of said judgment had been paid, and afterwards notified said commissioner that said company was issuing policies of insurance within this state, although said judgment remained unpaid, and had demanded that the commissioner should prosecute said company and its agents issuing such policies, for the penalties provided by law for such violation of the statutes of this state, and had tendered to him evidence of the facts, and had demanded of him that he revoke the license so granted to said company; that said commissioner had nevertheless hitherto unjustly refused to prosecute said company and its

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said agents, or to revoke the license of the company, to the injury of the relator. The writ thereupon commanded said commissioner that, immediately on receipt thereof, he should prosecute said company and its said agents, and revoke said license, or show cause, etc.

To this writ the respondent made a return, the substance of which will sufficiently appear from the opinion. The relator demurred to the return as insufficient, and asked for a peremptory writ.

J. G. Flanders, for the demurrant.

J. P. C. Cottrill, *contra*.

COLE, J. It appears from the return made by the commissioner of insurance to the alternative writ, that judgment against the company and in favor of the relator was entered in the county court of Milwaukee county on the third day of May, 1879; that immediately upon the rendition of such judgment the counsel for the company took steps to perfect an appeal in the cause to this court; that they at once ordered a copy of the stenographer's notes of the trial, with a view to preparing a bill of exceptions; that such bill was actually settled and signed by the judge on the third day of July, 1879; that on the twelfth day of that month the appeal was perfected by due service of a notice of appeal, together with an undertaking for costs and to stay execution according to sections 3052 and 3053 of the Revised Statutes. Now the question on the demurrer is, whether these facts are a sufficient answer in law to the writ. The writ required the commissioner to prosecute the various agents of the insurance company, within this state, who have issued new policies of insurance since the second day of July, 1879, for the penalties prescribed by statute, and to revoke the license of the company, because this judgment against the company remained unpaid after the expiration of sixty days from its rendition.

Section 1974, R. S., provides that no insurance corporation

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doing any kind of insurance in this state, against which a final judgment shall have been recorded in any court of this state, shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy of insurance; and in case the officers or agents of the company violate the provisions of this section, the company forfeits the sum of \$1,000, and the agent knowingly violating the section forfeits not less than \$100 nor more than \$500. Chapter 171, Laws of 1879, makes it the duty of the commissioner to take cognizance of the insurance laws of this state, and to bring such violations to the attention of any company; and in case of the persistent violation of any such laws in respect to any company, it is made his duty, in case of a foreign company, to revoke its authority to do business in this state. In the return the commissioner admits, upon information and belief, that after the expiration of sixty days from the rendition of the judgment, and while the same remained unpaid, the insurance company issued new policies; but the commissioner denies that this was, under the circumstances, any violation of law.

We are inclined to the opinion that this view is correct, and that the facts stated show a sufficient excuse for not complying with the mandate of the writ. We do not understand that it is made the duty of the commissioner to prosecute for penalties, if any have been incurred under the statute. That duty is imposed upon another officer of the government. Nor do we think the commissioner would have been justified, upon the facts, in revoking the license of the company. The manifest object of the statute is to compel insurance companies to pay their debts which have gone into judgment, and, consequently, the law prohibits them from doing business in this state unless they pay and discharge final judgments due and payable within sixty days after their rendition. A question was made on the argument, whether a judgment which had been appealed from could be said to be "final," within the

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meaning of that word in the act, and whether the statute does not refer to a judgment or judicial decision which has passed beyond review, where no further hearing of the cause can be had. Waiving, however, that question, it will be observed that the statute speaks of a final judgment which shall, after sixty days from its rendition, *remain unpaid*. Now this language imports, *ex vi termini*, a judgment due and payable—one which the judgment debtor is bound to pay. Where a party in good faith takes an appeal from a judgment, and gives an undertaking to pay such judgment in case it is affirmed, he is surely not under obligation to go on and discharge the judgment by paying it. If he is, then it is manifest that his appeal and stay amount to nothing, and really do him no good. See Tay. Stats., ch. 132, § 44. It certainly must not be assumed that the legislature intended to deprive insurance companies of the benefit and right of appeal, or require them to stop transacting business until the appeal is determined. This would be the consequence were we to give the statute the construction contended for by the learned counsel for the relator. We therefore hold that the insurance company, by taking an appeal from the judgment in good faith, and giving the requisite undertaking to stay execution, took away the payable or dischargeable quality of the judgment, if we may so speak, and relieved itself from the obligation to pay the same until the appeal was disposed of.

It follows from these views, that the facts set up in the return by the commissioner constitute a sufficient answer in law for his not revoking the license of the company to do business in this state.

By the Court. — The demurrer to the return is overruled.

Kidd vs. Fleek.

KIDD VS. FLEEK.

NEW TRIAL: APPEAL: REVERSAL: EVIDENCE. (1) *New Trial.* (2) *What questions considered on appeal.* (3) *Degree of evidence required to sustain justification in slander.* (4-7) *Evidence.* (8) *What errors in instructions will reverse.*

1. In this case there was evidence to support the verdict; and this court cannot hold that the court below abused its discretion in refusing a new trial.
2. In slander, no question having been made by plaintiff in the court below upon the *degree* of evidence necessary to support the defendant's justification, the question cannot properly be raised here.
3. To sustain a justification in slander, is is not necessary to satisfy the jury beyond reasonable doubt.
4. Where, in slander, a witness had testified to a declaration of defendant charging plaintiff with theft, he was asked whether he understood defendant to make the charge. *Held*, immaterial and improper.
5. A witness who had testified to a declaration of defendant charging plaintiff with theft, and stating the circumstances, was asked if he knew *who* was charged. *Held*, immaterial and perhaps improper.
6. A witness who had testified that he witnessed the theft, of corn, from defendant's cornfield, and that he visited the *locus in quo* some time afterward, was asked what he saw there, and answered that "corn had been husked there." *Held*, competent.
7. In the same action plaintiff testified that her family had corn of their own, and stated how much; but the latter statement was stricken out on defendant's motion. *Held*, immaterial.
8. A judgment will not be reversed for an instruction which was not erroneous when taken in the sense in which the jury must have understood it.

APPEAL from the Circuit Court for *Green* County.

Slander. The complaint contained two counts, relating to language used on two different occasions, the alleged defamatory charge against plaintiff in both cases being, in substance, that she had been guilty of the crime of larceny in stealing corn from the defendant. The answer alleged "that the supposed slanderous matters set up in the complaint are true of the plaintiff;" and further set out the facts which induced defendant to make the charge complained of.

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The exceptions taken to the rulings of the court upon evidence, and to the instructions given, will sufficiently appear from the opinion.

Defendant had a verdict; a new trial was denied; and plaintiff appealed from a judgment on the verdict.

The cause was submitted on the brief of *Smith & Lamb* for the appellant, and that of *Winans & McElroy* for the respondent.

Counsel for the appellant, besides arguing the exceptions to other rulings of the court in respect to evidence, contended that defendant, having pleaded the truth of the defamatory words in justification, was bound, in order to have a verdict in his favor, to make proof of the larceny charged upon plaintiff, with the same strictness as if plaintiff had been on trial for that crime (2 Greenl. Ev., 5th ed., § 426); that there was no sufficient evidence to sustain the verdict, under that rule; and that the refusal of a new trial was therefore error.

RYAN, C. J. There was evidence to support the verdict, and this court cannot hold that the court below abused its discretion in refusing a new trial. *Janssen v. Lammers*, 29 Wis., 88; *Paine v. Roberts*, id., 642.

No question was made in the court below upon the degree of evidence necessary to support the respondent's justification. The question cannot, therefore, be properly raised in this court. *Butler v. Carns*, 37 Wis., 61. But it was not necessary to satisfy the jury beyond a reasonable doubt. *Washington U. I. Co. v. Wilson*, 7 Wis., 169; *Wright v. Hardy*, 22 Wis., 348; *Blaesser v. Ins. Co.*, 37 Wis., 81.

A witness had testified to a declaration of the respondent charging the appellant with theft. He was then asked whether he understood the respondent to make the charge. The question was quite immaterial, and indeed improper, because it called for construction by the witness of language needing none, if the witness were competent to give it.

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Another witness had testified to a declaration of the respondent charging the appellant with the theft, and stating the circumstances. He was then asked if he knew who was charged. This question was also immaterial, and perhaps improper, for similar reasons.

Again, a witness had given evidence tending to show that he witnessed the theft from the respondent's cornfield. He visited the *locus in quo* some time after. He was asked what he saw. He answered that corn had been husked there. This was of little weight, but was competent.

The respondent had charged the appellant with stealing corn. The appellant testified that her family had corn of their own. She was asked and stated how much. The answer to the latter question was stricken out on motion of the respondent. It is difficult to understand why the appellant should desire to make the statement, or the respondent to exclude it. It was quite irrelevant. It might possibly have some bearing on the question of the appellant's guilt of the crime imputed to her, that she was under no temptation to commit it; but the degree in which she was removed from temptation was certainly immaterial.

The learned judge of the court below told the jury that it was not pretended that the corn could have been stolen, except by the appellant's entry into the respondent's field. It is argued here that this tends to impute the crime to the appellant. But, read in the light of the whole charge, it manifestly signifies, and the jury must have understood it to signify, that the appellant could not have stolen the corn except by entry into the cornfield. *Scheike v. Johnson*, 39 Wis., 384; *Dorsey v. Construction Co.*, 42 Wis., 583.

These are the only errors assigned. Little stress is laid upon any of them here, and they do not appear to warrant an appeal to this overburdened court.

By the Court.—The judgment of the court below is affirmed.

Jewett vs. Fink and another. (Cross Appeals.)

JEWETT VS. FINK and another. (Cross Appeals.)

JUDGMENT NOTE, Action on. (1) *Practice in such actions.* (2) *By whom judgment to be signed.*

CHATTEL MORTGAGE. (3, 4) *Defenses by creditors of mortgagor.* (5) *Evidence.*

1. In an action in a federal circuit court for a district of this state, on a judgment note, there was filed with the declaration, note and warrant of attorney in the usual form, an answer signed by an attorney on defendant's behalf, confessing that the amount claimed was due on the note, and releasing all errors; and there was annexed to the papers an affidavit of plaintiff's attorney, stating that the sum claimed was due upon the note, and also stating the sources of affiant's information or knowledge, and the reason why the affidavit was not made by the plaintiff in person. *Held*, a substantial compliance with secs. 13, 14, ch. 140, R. S. 1858.
2. Such a judgment signed only by the clerk, but purporting by the record to have been rendered in open court, is *held* valid.
3. Whether or not the mortgagor of chattels, in trespass against him by the mortgagee for a wrongful taking and conversion of the property, could show in mitigation of damages that the mortgage was given and taken with intent to defraud creditors (a question not in this case), that defense may be made by judgment creditors or persons representing them.
4. Even where it appears that the chattels mortgaged were exempt from sale on execution, judgment creditors (or their representatives) may show, as against the mortgagee, in mitigation of damages, that the mortgage was not given to secure any debt, and that nothing is due or to become due thereon.
5. In trespass by the keeper of a stable for the taking from his possession, and conversion, of a horse, upon which he claimed a lien for its keeping, the defendants, being creditors of the owner of the horse, offered evidence of an attempted settlement of all accounts between such owner and the plaintiff, in which the latter made no claim against the former for the keeping of the horse. It appears that the parties were attempting at that time to *compromise* and settle their affairs; and the evidence was rejected on that ground. *Held*, no error.

RYAN, C. J., dissents from the judgment.

APPEALS from the Circuit Court for *Kenosha* County.

The case is thus stated by Mr. Justice COLE:

"These are cross appeals from the same judgment. The

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action is trespass *de bonis*, etc., the subject matter of the controversy being a horse. The complaint consists of two counts. In the first, the plaintiff claims the property by virtue of a chattel mortgage given by the owner, one Price, purporting by its terms to secure the payment of \$825.38 in six months thereafter, and authorizing the plaintiff to take possession of the horse at any time and sell the same, and out of the proceeds of such sale to satisfy said debt, and the expenses of sale and of keeping the horse. The plaintiff took and held possession of the property for more than two years and a half, when it was taken from his possession by the defendants. It is averred in the complaint that the horse was exempt from sale upon execution. In the other count the plaintiff claimed a lien upon the horse as stable-keeper, under the statute.

"The answer sets up that the defendants are respectively United States marshal and his deputy, and justifies the taking of the property under a *fi. fa.* issued out of the United States circuit court, wherein one Dow was plaintiff, and Price, the mortgagor, defendant; and alleges that the chattel mortgage under which plaintiff claims, was made with the intent to defraud and delay creditors, etc.

"On the trial of the cause, evidence was given, against the plaintiff's objection, which strongly tended to prove that the chattel mortgage was without consideration; that no indebtedness whatever existed on the part of Price to the plaintiff when it was given; that it was not intended to secure either a present or future indebtedness, but, as Price was expecting to remove from Wisconsin to Chicago, the mortgage was executed, under the advice of his attorney, solely for the purpose of placing the horse beyond the reach of Price's creditors. And it may be stated here that the answer shows, and indeed the fact is not controverted, that Price did not remove to Chicago as he intended doing, but has continued to be a resident of the city of Kenosha.

"The jury found a special verdict upon questions submitted

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by the court. They found that the mortgage was not given to secure an indebtedness then due or to become due from Price to the plaintiff, but was executed with the fraudulent design or intent, on the part of both mortgagor and mortgagee, to hinder and delay the creditors of Price. They further found that nothing was due the plaintiff upon the mortgage for either principal or interest; also that Price, when he gave the mortgage, did not own any ox or oxen, mule or mules; thus, in effect, finding that the horse at that time was exempt.

"The plaintiff moved for judgment on such verdict, for the amount due by the terms of the mortgage and interest, which motion was denied. Judgment was then entered that as to the first cause of action the plaintiff take nothing; that as to the second, he recover \$469 as damages, and costs. The plaintiff appeals because the court refused to give judgment on the verdict for the full amount of damages claimed by him. The defendants appeal because he had judgment for the expense of keeping the horse."

The appeal was submitted on the brief of *J. V. & C. Quarles* for the plaintiff, and briefs of *J. M. Stebbins* and *S. K. Dow* for the defendants.

For the plaintiff it was argued, *inter alia*, 1. That the affidavit filed with the warrant of attorney was insufficient (*Thompson v. Hintgen*, 11 Wis., 112); that the agent making such an affidavit must know the facts, and must disclose his means of knowledge (*McCabe v. Sumner*, 40 Wis., 386, 391), and must state the latter as fully as on verification of a complaint (*Crane v. Wiley*, 14 Wis., 658); that the affidavit does not show what part of the alleged facts rested on the "admissions of the defendant;" that the statements of the plaintiff to the affiant were not a legal means of knowledge; that the possession of the prior note, whose surrender is asserted to be the consideration of the note in question, would not support any inference, unless it were that the former note was still unpaid and an existing obligation; that there is no averment in the

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affidavit that any sum is due on the note in suit, but only that the affiant is so informed by the plaintiff, and believes it to be true; that the affidavit should show the *consideration* (3 Wait's Pr., 687, and cases), which is not shown here, because it nowhere appears that the prior note was extinguished; and that the insufficiency of the affidavit may be taken advantage of in a collateral action. *Nichols v. Kribs*, 10 Wis., 76.

2. That the pretended judgment on warrant of attorney was void because signed only by the clerk, and not by "a judge or court commissioner" as required by Tay. Stats., 1652, § 16. Freeman on Judgm., § 547; *Chapin v. Thompson*, 20 Cal., 681; *Remington v. Cummings*, 5 Wis., 138, 142; *Fairchild v. Dean*, 15 id., 206; *Wadsworth v. Willard*, 22 id., 238. A federal court cannot by any practice make that a judgment which is null by state laws. But the national courts are obliged to follow the state practice. R. S. U. S., § 914. Besides, the right of every citizen to have his day in court, and to be brought in by process, cannot be taken away except in the manner pointed out by statute. *Ins. Co. v. Brine*, 10 Oh. Leg. News, 283.

3. That the mortgage was valid as between the parties to it, even if given with fraudulent intent. *Clemens v. Clemens*, 28 Wis., 637, 646. It was error, therefore, to admit evidence on the part of defendants for the purpose of showing fraud in the mortgage, before they had shown themselves to be creditors. *Jones v. Lake*, 2 Wis., 210; *Eaton v. White*, id., 292; *Norton v. Kearney*, 10 id., 443, 452; *Bogert v. Phelps*, 14 id., 88; *Lincoln v. Cross*, 11 id., 91; *James v. Van Duyn*, 45 id., 512; *Damon v. Bryant*, 2 Pick., 411; *Decker v. Bryant*, 7 Barb., 182; *Pemberton v. Smith*, 3 Head, 18.

4. That the property being exempt, the mortgage could not be fraudulent as to creditors. *Bond v. Seymour*, 2 Pin., 105; *Dreutzer v. Bell*, 11 Wis., 114; *Pike v. Miles*, 23 id., 164; *Hibben v. Soyer*, 33 id., 319; *Carhart v. Harshano*, 45 id., 840; *Dart v. Woodhouse*, 40 Mich., 399.

5. That there was nothing in plaintiff's claim of a lien as stable-keeper in-

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consistent with his claim as mortgagee. Until sale, an interest or equity in the property remained in the mortgagor. *Stoddard v. Denison*, 38 How. Pr., 296. The mortgagee, in addition to his mortgage lien, may have an equitable lien from another source. *Armstrong v. McAlpin*, 18 Ohio St., 184. He may secure further advances by a second mortgage; and possession under the first does not militate against the lien of the second. The two liens gave plaintiff a right to hold the horse until both debts were discharged. And if the mortgage was void, the agister's lien would attach of course.

For the defendants it was argued, 1. That as it appeared from plaintiff's own testimony that he had advertised the horse for sale under the mortgage, while, as the jury found, there was nothing due him on the mortgage, this was a conversion, and a forfeiture of the lien claimed; and that the alleged lien for the keeping of the horse was also waived by plaintiff's failure to set it up as the ground of his refusal to deliver the horse upon defendants' demand. Phillips' Mech. Liens, 504-5, 509, 661-2, 667; *Vincent v. Conklin*, 1 E. D. Smith, 203; *Walther v. Wetmore*, id., 7; *Hanna v. Phelps*, 7 Ind., 21; *Dows v. Morewood*, 10 Barb., 183, 187; *Picquet v. McKay*, 2 Blackf., 465; *Legg v. Willard*, 17 Pick., 140. 2. That while state legislatures may direct in what formal way officers of state courts shall conduct their proceedings, they cannot control the forms and modes of proceedings of courts of the United States; that while, under R. S. U. S., § 914, it has been held that U. S. courts will conform, as near as may be, to the practice of the states in which they exercise jurisdiction, there is nothing in this that compels the officers of a federal court to enter up and sign judgments after the exact manner prescribed by the state statutes for the clerks and judges of the state courts; and that in any event the validity of the judgment could not be questioned in a collateral action in another court, to which the defendant in that judgment was not a party. 3. That under the findings of the jury, the mortgage was

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merely colorable and wholly invalid; and that "when one having exempt chattels abandons or is about to abandon the use of them, on which the exemption rests, and, for the purpose of keeping them out of the reach of his creditors, makes a *colorable* gift or sale of them *for his own use*, the fraudulent intent will avoid the sale or gift as against the creditors." *Curhart v. Harshaw*, 45 Wis., 347.

COLE, J. The first error assigned on the part of plaintiff for reversing the judgment is, that the court below erroneously admitted the record of the judgment in the case of *Dow v. Price*, under which defendants justified. The judgment in the United States court was by confession upon what is called a judgment note. It is objected that there was no sufficient statement or affidavit of the amount due on the note to authorize the entry of judgment; but it seems to us the judgment was entered in substantial conformity to sections 13 and 14, ch. 140, Tay. Stats. The record shows that a declaration was filed, also an answer signed by an attorney on behalf of defendant, confessing the amount due as claimed in the declaration, and releasing all errors, together with the note and warrant of attorney authorizing a confession of judgment for the amount due on the note. The attorney for the plaintiff annexed to the papers his affidavit, stating that the sum of \$1,728 was due upon the note set forth in the declaration; stating also the source or grounds of his information or knowledge upon the subject; and disclosing the reason why the affidavit was not made by the plaintiff himself. It seems to us this was a sufficient compliance with the statute.

But it is further objected that it does not appear that there was any judgment; that what purports to be a judgment was signed by the clerk alone. There is nothing in the record which warrants the assumption that the judgment was entered by the clerk alone; on the contrary, the presumption is that it was rendered in open court. The record itself so imports

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upon its face, and that is conclusive upon the question. It was of course essential to the defense set up in the answer to show a valid judgment, and this, we think, the defendants did. It follows, therefore, that there was no error in admitting the record in evidence for the purpose of showing that the defendants represented a creditor of Price, and had the right to inquire into the validity and consideration of the mortgage under which plaintiff claimed the property.

The second error assigned is, that evidence tending to show fraud in the mortgage was improperly admitted, against the plaintiff's objection. This position is obviously founded on the assumption that the defendants were mere tortfeasors, who had no right to inquire into the validity of the mortgage; for the very able counsel did not deny, nor would he wish to be understood as controverting, the principle, elementary in the law, that a creditor may question a transfer of property made by his debtor in fraud of his rights. But the counsel says that the mortgagor, Price, would not be heard to impeach the mortgage for fraud in the transaction; that as to him the instrument is valid. It is frequently the case that a conveyance good as to the parties to it is voidable as to creditors. This the counsel does not deny.

We are not entirely clear, however, that if Price himself were defendant in this action, it would not be competent for him to show, in mitigation of damages, that the mortgage was not an existing obligation, because originally given with intent to defraud creditors. But, however that may be, the defendants, who stand in the place of and represent a creditor of the mortgagor, may attack the mortgage. This is certainly so unless, on account of another fact which we will notice, they are precluded from attacking the mortgage or showing that there was really nothing due upon it. The jury in effect found that the horse was exempt when the mortgage was given, and we have already said it appears that Price had continued to reside in Kenosha. But the question was not submitted, nor

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did the jury find, whether, if the mortgage were avoided for fraud or upon any other ground, the horse would still be exempt in the hands of the mortgagor. Price was made a witness by both sides. In answer to a question asked him by plaintiff, he testified that when the mortgage was given he did not own, nor has he since owned, any other horse, mule or mules, ox or oxen. It is proper, likewise, to say in this connection that the same witness testified on the part of the defendants, without objection, that when this action was commenced, the plaintiff was indebted to him in a sum exceeding \$400, and this testimony was not denied by the plaintiff. Indeed, so far as Price is concerned, he waives all exemption, and seems to be willing that the horse should be sold to satisfy the execution held by defendants. But the contention is that, as the horse was exempt, the element of fraud was entirely out of the case, and it was the duty of the court below to disregard all of the verdict which touched that question, and to have given judgment for the plaintiff on the first count in the complaint. As a matter of law, it is said the court should have held that the mortgage could not be fraudulent; that although the intent, together with all the facts necessary to make the transfer fraudulent under other circumstances, were found or admitted, yet the law will ignore them all if the property is exempt, inasmuch as fraud cannot be predicated upon a transfer of property specifically exempt from execution. Conceding for the argument that this position is correct, still we do not well see how the court would have been justified in giving judgment on the first count, in view of the finding that neither principal nor interest was due on the chattel mortgage. As we understand the verdict, this finding refers expressly to the \$825.38, the mortgage debt named.

There is ample evidence in the record, as it now stands, to sustain such a finding, that nothing was due the plaintiff on that claim; that there never was any actual liability or obligation on the part of the mortgagor to pay that debt, or, if there

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ever had been, that such liability had been extinguished and discharged. But, moreover, the bill of exceptions does not purport to contain all of the testimony, and there may have been conclusive proof upon this point. In this action, between the plaintiff and the creditor of the mortgagor, we can see no legal objection to showing in mitigation of the damages that the mortgage debt was extinguished, or did not in fact exist, even if the horse, when the levy was made, was exempt by law from sale on execution; for upon what principle is the plaintiff allowed to recover more damages than he has actually sustained by the levy and sale under the execution? It being, therefore, competent to show these facts in mitigation of damages, we must assume on the record that the evidence abundantly supported the ninth finding in the special verdict, that no amount was due the plaintiff upon the chattel mortgage set out in the complaint, for principal and interest. It follows from these views, that the third and fourth errors assigned on the part of the plaintiff for a reversal of the judgment are overruled.

In respect to the other appeal, we are inclined to think the judgment as it stands is correct. The jury found that Price was indebted to the plaintiff for keeping and caring for the horse at his stable from September 24, 1874, to May 12, 1877, in the sum of \$469. It would certainly be an admissible construction of the mortgage to say that it secures to the plaintiff a lien for any expense he might incur for keeping the horse while the same was in his possession. There could be no objection that we can perceive to such a stipulation in the mortgage. The jury have found upon the evidence what it was worth to keep the horse, and their finding upon the question cannot be disturbed. It is true, Price testified that the plaintiff was not to be paid anything for keeping the horse, but was to keep him for his private use in driving. But it was for the jury to say, upon the conflicting statements of the witnesses, what the real agreement was; and the mortgage itself would

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seem to sustain the claim of the plaintiff. While the witness Price was being examined by the defendants, he stated that he had three several interviews with the plaintiff, when both brought all their account books in order to effect a settlement of their matters. It was proposed to show by the witness that on these occasions the plaintiff rendered all his accounts against him, but made no charge for keeping the horse. The testimony was objected to, and ruled out.

It is now insisted by defendants' counsel, that the evidence was admissible to show that the claim of the plaintiff for keeping the horse was an afterthought. I have had some doubt whether the ruling of the court upon this point was correct; but I infer, from what is said in the briefs of counsel, that the reason why the testimony was excluded was, that it appeared that the parties at the time were attempting to compromise and settle their affairs, and that that was the ground for excluding it. I am not clear but in that view the testimony was inadmissible.

We think the judgment upon both appeals must be affirmed.

By the Court. — Judgment affirmed on both appeals.

RYAN, C. J., dissented.

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SALE: DAMAGES. *Measure of damages for failure to deliver goods.*

1. Where goods sold have not been paid for, the measure of damages for failure to deliver them according to contract is generally the difference between the contract price and the market value of like goods at the time and place stipulated for such delivery.
2. But where the special purpose for which the goods were wanted by the vendee was known to the vendor, he is liable on the contract for any special damage resulting to the vendee (without fault on his part) from the failure to deliver; such special damage being the natural consequence of the nondelivery, presumably contemplated by the parties.

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3. In every such case, the unpaid contract price of the goods must be deducted from the aggregate of the damages which the vendee would have been entitled to recover if he had paid the vendor such contract price.

APPEAL from the County Court of *Milwaukee* County.

Action to recover damages for defendant's breach of contract. Plaintiff had a verdict and judgment for \$200; and defendant appealed.

The nature of the contract and of the breach thereof, and the errors alleged, will sufficiently appear from the opinion.

For the appellant, there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson*. In support of the view that the contract price of the ice should be deducted from the gross damages accruing to the plaintiff from all causes, they cited *Sedgwick on Dam.*, 260; *Bank of Montgomery v. Reese*, 26 Pa. St., 143; *McHose v. Fulmer*, 73 id., 365; *Messmore v. N. Y. Shot & Lead Co.*, 40 N. Y., 422. If plaintiff had paid for the ice in advance, he would have been compelled to elect either to rescind the contract and sue for the money paid, with interest, and that only, or else to affirm the contract and sue for damages only. He could not have had both interest and damages. *Harvey v. Myer*, 9 Ind., 391.

For the respondent, there was a brief by *Austin & Runkel*, and oral argument by *Mr. Austin*. They contended, 1. That plaintiff was entitled to recover not only the difference between the contract price of the goods and the market value of the same goods at the time and place agreed upon for delivery (2 Greenl. Ev., § 261, and note 4; Addison on Con., 3d Am. ed., § 589), but also all other damages actually sustained by him through defendant's breach of the contract, and which could not be prevented by reasonable endeavors and expense (*Richardson v. Chynoweth*, 26 Wis., 656; *Shepard v. The Gas Co.*, 15 id., 318; *McHose v. Fulmer*, 73 Pa. St., 365; *Bunk v. Reese*, 26 id., 143; *Crist v. Armour*, 34 Barb., 378;

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Alfaro v. Davidson, 40 N. Y. S. C., 87; *James v. Adams*, 8 W. Va., 568; 2 Comyn. on Con., 365; 2 Parsons on Con., 461, and note; Addison on Con., and 2 Greenl. Ev., *ubi supra*); and especially such consequential damages as were contemplated by the parties when the contract was made. *Hadley v. Bazendale*, 26 Eng. L. & E., 398; *Booth v. S. D. Rolling Mill Co.*, 60 N. Y., 487; 2 Wait's L. & P., 656. 2. That as the contract was one on which the defendant could recover nothing without full performance or tender of performance on his part, there was no reason why the contract price or any part of it should be set off against or deducted from the plaintiff's actual damages.

COLE, J. The only question in this case relates to the rule of damages for the failure of the defendant to supply ice according to his contract. The plaintiff was a butcher by trade, and the defendant undertook and agreed to furnish him with what ice he might require for his ice box, in which he kept fresh meat, at a stipulated sum for the season of 1878.

About the last of July the defendant stopped supplying ice, and refused any longer to furnish the plaintiff with ice for his box. In consequence the plaintiff lost considerable fresh meat, which spoiled for want of ice. The defendant had supplied the plaintiff with ice the previous season, and well understood the use to be made of the ice which he contracted to deliver. Nothing was paid by the plaintiff on the contract. In respect to the measure of damages the learned county court directed the jury to the effect that, where the vendor fails to deliver goods according to his contract, as a general rule, the vendee, in an action for the breach, would be allowed to recover as damages the difference between the price agreed to be paid for the goods to be delivered and the market value of the goods at the time the contract was broken; that in this action the plaintiff was entitled to recover all such damages as would naturally flow from a breach of the contract on the

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part of the defendant — that is, such damages as the plaintiff sustained by reason of loss of meat, etc., providing such loss occurred without any fault or negligence on his part to procure the necessary ice elsewhere to preserve his meat during the time for which the contract was to run; that it was necessary for the plaintiff to use reasonable care and make reasonable exertions to obtain a sufficient quantity of ice, if it could be procured, in order to prevent his meat from spoiling; but that he was not obliged to use extraordinary diligence to purchase ice to entitle him to damages on that ground. To this charge no exception was taken, but the defendant's counsel asked the court further to instruct the jury that the contract price of the ice was to be deducted from the damages of all kinds, because the plaintiff was not to be allowed the same damages that he would have had had he paid the contract price. The court declined to give this request, but added in substance that if the plaintiff had performed the contract on his part according to its terms, and had bought ice, whatever such ice cost him above the contract price would be the measure of damages; but as to the other damages which resulted to him in consequence of the nonperformance of the contract, which he was unable to avoid by reason of inability to procure the necessary ice, these damages had no connection with the contract at all.

Now the learned counsel for the defendant makes two criticisms upon the charge as given, and the refusal to instruct as requested: *First*, he says that as to the spoiled meat the court below regarded that as a cause of action in tort, and as to that adopted the rule of damages which would have been applicable if the injury were a trespass or other wrong committed by defendant, rather than a breach of contract on his part; and, *second*, the rule laid down by the court gives the plaintiff the same damages for nondelivery of the ice which he had not paid for, which he would have been entitled to receive had he paid for it.

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Of course this was an action for a breach of the contract; but as the defendant fully knew the use which the plaintiff wished to make of the ice he agreed to deliver, namely, to supply his ice box in order to preserve fresh meat, there is no hardship in allowing the plaintiff to recover "not only *general* damages—that is, such as are the necessary and immediate result of the breach,—but *special* damages, which are such as are the natural and proximate consequence of the breach, although not in general following as its immediate effect." Benjamin on Sales, § 870. This is the rule on the subject of the measure of damages on breach of contract laid down in *Hadley v. Baxendale*, 9 Exch., 341, which has been approved by this court (see *Shepard v. Milwaukee Gas Light Co.*, 15 Wis., 318; *Richardson v. Chynoweth*, 26 Wis., 656), and seems applicable to the facts of this case; that is, "if the special circumstances, under which the contract was actually made, were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from the breach of contract under those special circumstances so known and communicated." ALDERSON, B., in *Hadley v. Baxendale*.

Now, as the defendant was acquainted with all the special circumstances in respect to this contract—knew for what purpose the ice agreed to be furnished by him was to be used,—he should fully indemnify the plaintiff for the loss he sustained by nondelivery of the ice; and he was, therefore, justly chargeable in damages for the meat spoiled in consequence of the inability of the plaintiff to procure ice elsewhere. This is a legitimate element to be considered in estimating the plaintiff's damages. It is a consequence which "may reasonably be supposed to have been in the contemplation of both parties, at the time of making of the contract, as the probable result of the breach of it." But it is obvious that these damages were con-

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nected with the contract itself, and there was, therefore, an inaccuracy in the charge of the court in which it was said that such damages "had no connection with that contract at all." But this expression of the learned county court was, perhaps, not as likely to prejudice the defendant as the refusal to give the instruction asked, to the effect that the price of the ice was to be deducted from the damages of all kinds, and that the plaintiff was not entitled to recover the same amount of damages he should have had if he had paid the contract price.

That a vendee who has not paid the consideration should, in an action for nondelivery by the vendor, recover the same damages that he would where he had paid the contract price, is a proposition so obviously unsound as not to need argument to show its fallacy. Prof. Greenleaf says: "Upon a contract to deliver goods, the general rule of damages for nondelivery is the market value of the goods at the time and place of the promised delivery, if no money has yet been paid by the vendee; but, if the vendee has already paid the price in advance, he may recover the highest price of such goods in the same place at any time between the stipulated day of delivery and the time of trial." 2 Greenl., § 261.¹ For reasons already stated that rule could not apply here, but the remark shows that a real distinction exists between a case where the vendee has paid the contract price and where he has not, as to the rule of damages. Damages which were the natural and proximate consequence of a breach of the contract, such as the loss of meat, etc., were allowed the plaintiff in this case, and, as we think, justly. And we also think it would be equally just to deduct the contract price of the ice from the gross damages, and that this rule will fully indemnify the plaintiff for his loss on failure of the defendant to perform his contract.

The following cases, to which we were referred on the argu-

¹ NOTE. — A somewhat different rule of damages from the one given by Prof. Greenleaf in this section was laid down by this court in *Ingram v. Rankin*, ante, p. 406.

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ment by defendant's counsel, while not directly in point, have a bearing upon the question: *Messmore v. The N. Y. Shot & Lead Co.*, 40 N. Y., 422; *Bank of Montgomery v. Reese*, 26 Pa. St., 143; *McHose v. Fulmer*, 73 Pa. St., 365; *Harvey v. Myer*, 9 Ind., 391.

By the Court. — The judgment of the county court is reversed, and the cause remanded for a new trial, unless the plaintiff remits from the amount of the verdict the contract price of the ice. Upon such a *remittitur* being filed, the court will give judgment for the amount of the verdict less such deduction; otherwise let there be a new trial.

OWENS VS. THE CITY OF MILWAUKEE.

REGRADEING STREETS IN MILWAUKEE. (1) *Lot-owner's remedy for injury to lot.* (2) *Estoppel against recovery of damages for illegal acts.* (3, 4) *When lot-owner cannot recover for filling in front of his lot upon illegal order.* (5) *Assessments for city improvements: what irregularities a ground of action.*

1. Owners of lots in Milwaukee, injured by a change regularly made since ch. 129, Laws of 1873, in the established grade of an adjoining street, cannot bring an original action in the circuit court for such injuries; but must proceed by appeal, within the time limited by that act, from the assessment of benefits and damages made by the board of public works.
2. One cannot recover of a municipality damages for illegal acts of its officers, if, with knowledge of their illegality, he has assisted in their performance.
3. The common council of Milwaukee, claiming to act under said ch. 129, changed the established grade of a street, and ordered it to be filled to the new grade; but the order was void for irregularity of the proceedings upon which it was made. Plaintiff, in accordance with such order, filled said street to the new grade in front of his own lot fronting thereon. In an action for the value of such filling, and for injury to the lot from the change of grade: *Held*,

(1) That if plaintiff did the work knowing that the order was void, he cannot recover therefor.

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(2) That if he did it believing that the proceedings were legal, then, from his failure to appeal from the assessment of benefits and damages made by the board of public works, it must be presumed that he was satisfied with such assessment, by which it was decided that the benefits to the property were a full compensation for the work.

(3) That if he did it without taking any measures to ascertain whether the proceedings were regular, he must still be held to have thereby agreed to take, for his expenditures and damages, the compensation awarded by the officers, viz., the benefits to the property.

4. The case of *Dore v. Milwaukee*, 42 Wis., 108, distinguished.

5. Under ch. 323 of 1875, the board of public works of Milwaukee was authorized to cause the street on which plaintiff's lot fronts, to be paved with wooden block pavement, without petition of the lot-owners therefor, or resolution of the common council authorizing it; one-third of the cost being required to be assessed against the lots fronting on such street, and two-thirds paid out of the ward fund. The complaint alleges, as to the repaving of said street upon the new grade, that some of the lots were assessed more than others, and the assessments were made arbitrarily; but does not allege that more than one-third of the cost was charged to the lots, or more than two-thirds to the ward fund; nor that plaintiff's lot was assessed for more than its just proportion of the whole cost of the work. *Held*, that it does not show any injury to plaintiff.

APPEAL from the County Court for *Milwaukee* County.

The case is thus stated by Mr. Justice TAYLOR:

"This action is brought by the plaintiff against the city of Milwaukee to recover for the expenses of raising the grade of the street in front of the plaintiff's lot in said city, and for damages to said lot by reason of changing the grade and filling the street up to such new grade.

"The plaintiff alleges that the grade of said street had been fixed and established in 1853, and the street graded in accordance therewith and paved, and that afterwards, in 1873, the common council of said city, pretending to act under the provisions of section 6, ch. 129, Laws of 1873, changed such established grade and raised the same several feet in front of said lot, and ordered such street to be filled in front thereof up to such new grade; that, in pursuance of such order, the plaintiff filled the street in front of his lot up to such grade;

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that afterwards the said city, pretending to act under the provisions of chapter 322, Laws of 1875, caused said street to be repaved, and plaintiff was compelled to pay a part of the expense of repaving the same; and that the expense of filling and paving was about the sum of \$300. The complaint sets out the proceedings of the common council and of the board of public works, relative to the establishment of such new grade and the filling and paving of the same; from which proceedings, as set out in the complaint, it is apparent that so much of them as relate to the proceedings under which it is claimed the work of filling the street up to the new grade was ordered, were entirely void; but, as we shall hereafter show, the subsequent proceedings for paving the street were apparently valid and regular. The plaintiff claims as damages the said sum of \$300, the cost of filling and paving said street, and the further sum of \$1,000 as damages to his lot occasioned by reason of filling such street up to the new grade.

"To this complaint the city demurred, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court below, and the plaintiff appealed."

Frank B. Van Valkenburgh, for the appellant.

D. H. Johnson, for the respondent.

TAYLOR, J. In order to understand the grounds of the defendant's demurrer, it becomes necessary to state some of the provisions of the charter of the city which have a direct bearing upon the questions raised by said demurrer.

Section 18 of subch. 10 of ch. 56, Laws of 1852, which is an act to consolidate and amend the charter of the city of Milwaukee, provides for the establishment of the grade of all the streets, sidewalks and alleys in said city, and that "when the grade so established shall be thereafter altered, all damages, costs and charges arising therefrom shall be paid by the city to the owner of any lot or parcel of land or tenement which

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may be affected in consequence of the alteration of such grade."

Section 3, ch. 401, P. & L. Laws of 1870, provides that whenever the board of public works of the city of Milwaukee shall deem it necessary to grade or otherwise improve any street, alley, sidewalk or public ground, they shall cause an estimate of the cost of such improvement to be made, and report the same to the common council, and, if approved by the council, the board may cause the work to be done, etc. Section 4 provides that before ordering any such work to be done, such board shall view the premises and consider the amount proposed to be made chargeable against the several lots, and the benefit which in their opinion will actually accrue to the owners of the same in consequence of such improvement; and in effect makes the lot chargeable with such part of the cost of the improvement as they shall consider it benefited thereby. Section 5 provides that the board shall give notice to the owners, in the official paper, that an assessment of benefits for such improvement is ready for inspection in their office, and require him to do the work within a certain time; gives the owner, if not satisfied with the assessment of benefits, the right to appeal to the common council, and if upon such appeal he is dissatisfied with the decision of the common council, to appeal from their decision to the circuit court.

Section 4, ch. 129, Laws of 1873, amendatory of section 5, ch. 401, P. & L. Laws of 1870, reads as follows: "Section 4. All persons owning or having any interest in any property affected by such assessment, shall, within ten days after the first publication of notice by the city clerk of the said city that such assessment has been reported to the common council, have a right to appeal therefrom to the said common council, and have the same right of appeal now provided by law from the said common council to the circuit court of Milwaukee county. But no such appeal to the said common coun-

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cil shall be taken after the expiration of ten days, as provided in this section. And in all cases of assessment hereafter to be made, such right of appeal to the said common council, and from the said common council to the said circuit court, shall be the only remedy for damages sustained by the proceedings or acts of the said city or its officers in the matter to which such assessment relates; and no action at law shall be maintained for injuries sustained by the proceeding or action of the said city or its officers in the matter to which any such assessment hereafter made relates, whether such action be founded on section 18 of chapter 10 of the act mentioned in the title mentioned in this act, and hereby amended, or otherwise."

Section 5 of said chapter 129 provides that in case the common council shall thereafter order the grade of any street to be changed, which has in fact been changed since the twentieth of February, 1852 — being the date of the passage of the amended charter which contains section 18, subch. 10, above referred to, — an assessment of benefits and damages shall be made as in the other cases of grading streets, and all the provisions of law relating to assessments for grading streets shall apply to assessments for grading such street, and the benefits and damages of such grading, "and the damages, costs and charges mentioned in section 18 of chapter 10 of the act hereby amended, shall be included in such assessment."

Section 13, chapter 401, Laws of 1869, provides as follows: "Any person entering into any contract with the city, and who agrees to be paid from special assessments, shall have no claim upon the city in any event except from the collection of the special assessments made for the work contracted for; and no work proper to be paid for by special assessment shall be let, except to a contractor who shall so agree."

It will be seen that the complaint alleges that the raising of the grade of said street was claimed to be done by the common council of said city in pursuance of the laws regulating the

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manner of doing the same, and that the cost of filling the same in front of the plaintiff's lot was assessed against said lot on account of the benefits which would accrue to it by reason of the raising of the grade in front thereof, and that because the same was so pretended to be assessed as benefits, and because the common council had ordered the work to be done by the plaintiff, and unless done by him the city would let the work by contract, and charge the cost of doing the same to the lot, he (plaintiff) did the work.

Under the charter of 1852, above cited, this court held that an ordinary action at law might be brought by the owner of any lot in said city to recover the damages, costs and charges arising from the change of grade of the street in front thereof, after the grade had been once established. *Goodrich v. The City of Milwaukee*, 24 Wis., 422. In the case of *Church v. The City of Milwaukee*, 31 Wis., 512, the decision in the case of *Goodrich v. The City of Milwaukee*, *supra*, was affirmed, and it was further held that the provisions of the charter, as amended by chapter 401, P. & L. Laws of 1869, amended by chapter 401, P. & L. Laws of 1870, giving appeals from the assessments of damages and benefits, did not apply to cases where a street grade was changed. Justice COLB, in commenting upon this point, says: "The learned counsel for the city suggests that the rule in *Goodrich v. Milwaukee* proceeded upon a misconception of the policy of the charter, and ought to be changed. But we still think the decision then made was correct, for the reason stated in the opinion.

"It seems to us that the city charter, and the various acts relating thereto, provide no methods for assessment of damages arising from the alteration of the grade of a street, and that the provisions in regard to the assessment of benefits, which is made by the board of public works, have reference to an entirely different class of cases; and, if this view be correct, it follows that the plaintiff's remedy by action has not been taken away or abrogated by the provisions in the

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acts of 1869 and 1870, above referred to." This case, and the case of *Stowell v. The City of Milwaukee*, 31 Wis., 523, settled a question as to the rule of damages in such case. They hold that the city in such action may, if it can, show in mitigation of damages, or for the purposes of defeating the plaintiff's right of recovery, that the change of grade, and the costs and expenses of such change, were compensated to the plaintiff by the appreciation in the market value of the property of the plaintiff in front of which such change was made.

Justice COLE, who also delivered the opinion in this case, says: "The counsel for the plaintiff objects to that portion of the charge which allows the general benefits conferred upon the plaintiff's premises, in common with the other property affected by the grade, to be offset against the direct damages. But, as we have said in the *Church* case, this was correct. The plaintiff cannot complain if he is indemnified against all loss resulting from the change of grade, and if his property is appreciated in its market value by the alteration, to that extent he is not damnified but benefited."

In the *Church* case, the court below had in effect charged the jury that the same rule as to damages must be applied as in the case of property taken by a railroad company; but the court say: "We think a different rule applies under the charter; for a street is usually graded in the city for the convenience of the public, and such grading not infrequently confers direct benefits upon all the lots on the street. If any one's premises are injured by the grade, he has no reason to complain, providing his actual loss is made good; and if the amount which the premises are actually diminished in value by reason of the grade is added to the cost and expense of putting them in the same relative position to the street after the change that they were before, the owner is fully indemnified within the intent of the charter. All damages, costs and charges arising from an alteration of the grade are paid him

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when this is done; and it is manifest, in determining the amount which the plaintiff's lot and improvements were lessened in value, it was proper for the jury to consider the nature and condition of the property before and after the grade, and any advantages and benefits which might be conferred upon it in common with other property on the street affected by the grade."

These cases settled two questions: *first*, that the appeal provided for in the charter of the city, as amended in 1869 and 1870, did not apply to the case of regrading a street upon a change of grade; and *second*, that, although the officers of the city could not bind the owner of a lot by an assessment of benefits, in case of regrading a street to a changed grade, either in whole or in part to offset the costs, expenses and damages caused by such regrade, yet in an action by the owner under the charter to recover such damages, the city could either in part or in whole defeat the plaintiff's action by showing that the plaintiff was benefited by increasing the market value of his lot by such change of grade.

These cases were decided in the June term, 1872, and at the next session of the legislature the city procured the passage of chapter 129, Laws of 1873. This act was clearly intended to remove the objection that in cases of the change of the grade of a street in said city no assessment of benefits and damages could be made, and that therefore in such cases no appeal from an assessment was allowable under the charter; and sections 4 and 5 of said charter were passed to make it clear that thereafter the only remedy which a party could have to recover his damages in such cases, if not satisfied with the assessment of damages and benefits made by the city authorities, was by an appeal as provided in that act. We are fully justified, therefore, in holding that at the time the grade of the street in question was changed, the city authorities had the right, and it was their duty, to make an assessment of the damages and benefits which the owners of the property on the street would sustain

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and receive by reason of such change of grade; that when such change of grade, and the filling or cutting necessary to conform to such new grade, were ordered to be done in the manner provided, by the charter, no party injured thereby could maintain an original action to recover any damages he might suffer by such change; and that his only remedy was by an appeal as provided in said chapter 129, Laws of 1873, if not satisfied with the assessment made by the board of public works.

The old provision of section 18, subch. 10 of the consolidated charter of 1852, is virtually repealed by the provisions of chapter 129, Laws of 1873, so far as it gave a remedy for the recovery of the damages sustained by the change of grade of a street, and substituted a new and exclusive remedy for the recovery of such damages; and this new remedy the party must now follow, or lose his right. The right itself being conferred solely by the statute, the legislature have full power to prescribe the remedy the party must pursue in order to avail himself of the statutory right.

The complaint of the plaintiff must therefore show a right of action against the city outside of the provisions of the charter, in order to recover. If he seeks to recover because the charter of the city says that in case of a change of grade he may recover the damages, costs and expenses he has sustained, the same charter says that he must recover the same by way of an appeal from the assessment made by the proper city authorities. He cannot rely on the statutory right to damages, and at the same time seek to recover such damages in a form of proceeding which the statute prohibits to him in such case.

Does the complaint state a cause of action without the aid of the charter? It is admitted, on the part of the counsel for the city, that the complaint shows on its face that the proceedings to change the grade and regrade the street were irregular and void. This being admitted, according to the opinion of

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this court, a party not consenting thereto may recover against the city for any injury done to his property by such change of grade and the filling the street up to such new grade. *Crossett v. The City of Janesville*, 28 Wis., 420. But it is claimed by the counsel for the city, that as the complaint shows that the plaintiff himself did the work voluntarily, for which he now claims compensation, and as the result of which he claims he was injured, he has brought himself within the maxim, "*volenti non fit injuria*," and therefore his complaint fails to state a cause of action. The learned counsel for the plaintiff insists that his client ought not to be considered as having voluntarily done the work which caused the damage, because he did the work of grading the street in the belief that the city officers were proceeding to do the same in a lawful manner, and that the city ought not to be heard to allege that they were not proceeding lawfully.

It might be a sufficient answer to this claim, that the plaintiff himself alleges that they were proceeding unlawfully; but another, and, as we think, more fatal objection to the right of the plaintiff to recover upon this theory is, that, if we are to presume that the city authorities were proceeding lawfully, and that the plaintiff did the work in that belief, then, not having taken any appeal from the assessment of damages and benefits, he must be presumed to have been entirely satisfied with the assessment made by the city authorities, and to have done the work in view of the fact that he was to get no other compensation than the benefits which would accrue to him by the change of grade, the city authorities having decided that such benefits were a compensation for doing such work.

Suppose he had not done the work himself, and the city had let the work by contract to a third person: then, this being a case where the contractor under the city charter, section 13, ch. 401, Laws of 1869, above cited, would have been compelled to take the contract with an agreement to be paid from the special assessments, the city would not have been obligated to pay

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the contractor for the work done, had the owner of the lots enjoined the collection of the special assessment on the ground that the proceedings were void. In cases of this kind this court has held that the contractor takes the risk of the regularity of the proceedings; he is charged with knowledge of the irregularities, if there be any; and if his assessment fails for any reason, he is without remedy against the city. *Hall v. The City of Chippewa Falls*, ante, p. 267; *Eilert v. Oshkosh*, 14 Wis., 586; *Fletcher v. City of Oshkosh*, 18 Wis., 232; *Finney v. Same*, id., 209; *Smith v. Milwaukee*, id., 63.

As between the city and the owner of the lot doing the work, it seems to us there would be less equity in allowing the owner to recover for the cost of the work than in allowing the contractor to do so. We think it clear that if the plaintiff did the work, supposing the city authorities had proceeded regularly, and were legally authorized to require the work to be done in this particular case, then he cannot recover. He comes within the maxim above cited. He voluntarily did the work, knowing that he was to have no compensation therefor, or for any damages which might result therefrom; as the city authorities had decided (and under the supposition above mentioned the plaintiff is presumed to have known it) that he was to have no such compensation either for his work or the damages resulting therefrom, because the benefits which would accrue to the plaintiff's property by regrading the street would fully compensate him for the cost of the work and the resulting damages.

On the other hand, if the plaintiff did the work knowing that the city officers were proceeding without any authority, and that all their acts were therefore illegal and void, it is equally clear that he cannot recover of the city the costs and expenses of doing the same, or the damages resulting therefrom. In such case he would be aiding the officers in the performance of acts which all knew were illegal and void, and the plaintiff would be in no position to claim that he supposed the

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officers "were in good faith, and with an honest view, endeavoring to obtain for the public a lawful benefit or advantage," within the rule laid down in the case of *Hamilton v. City of Fond du Lac*, 40 Wis., 47; *Squiers v. The Village of Neenah*, 24 Wis., 588-593; *Hurley v. Town of Texas*, 20 Wis., 634, and others of a similar character. The knowledge of the plaintiff that the acts ordered to be done by the city officers were illegal and void, would conclusively bar him from claiming that the city should respond to him in damages for the voluntary performance of the acts so illegally ordered to be done. A person claiming to recover of a municipality for alleged damages arising from the performance of illegal acts by its officers, will not be allowed to do so when it appears that he, knowing of the illegality of such acts, aided and assisted the officers in their performance.

The officers of a municipality are its agents, with limited authority. They can only charge the corporation when acting within their powers, except in those cases where there is a general power to do an act conferred, and the particular manner of doing the same is prescribed by statute. In such cases the municipality may be held responsible for the doing of the act by its officers charged with the duty of its performance, although such officers fail to follow the methods prescribed by law for doing the same. But this exception to the general rule cannot avail a party who, having full knowledge of the illegality of the proceedings of the officers, assists them in the performance of their unauthorized acts. In such case, the party, having knowledge that the agent was not pursuing his authority, can no more recover against the municipality, which is in fact the principal of the officers, than he can of a private person for doing an act upon the order of the agent of such person, knowing at the time that such agent had no authority to do the act on behalf of his principal.

We have shown that if the plaintiff did the work supposing the city authorities were proceeding regularly, or if he did it

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knowing they were proceeding irregularly, he cannot recover. It may still be a question whether he can recover if he did the work by order of the city officers, without any knowledge that they were proceeding irregularly, and without taking any measures on his part to ascertain whether their proceedings were regular or otherwise. In such case we think it is equally clear that he ought not to be permitted to recover against the city. He must be held to know that the character of the work directed to be done was such that it would necessarily be paid for in whole or part by special assessments against the property fronting the street upon which the work was ordered to be done, and that under the charter any damages which the plaintiff would be entitled to recover of the city, resulting from the doing of such work, would also be estimated and awarded by the proper city officers. If, therefore, he negligently and carelessly assumed that the officers who ordered the work done had legal authority to do so, he must be held to have done the work relying entirely upon the action of the city officers for his compensation, and for his damages. By doing the work upon their order, without any investigation as to their authority, he in effect agreed to take such compensation for his expenditures and damages as such officers might award to him.

The complaint shows that they did charge his lot with the expense of filling the street in front thereof, and determined that his lot was not damaged by such filling, but was benefited to the extent of the cost of the same; and, he having done the work upon such an assessment, and having taken no means authorized by the charter to enlarge his claim for damages, he must be presumed to have been satisfied with what was awarded to him by the city officers, whether awarded legally or otherwise. Having voluntarily done the work with a view solely to the compensation so fixed by the officers, he cannot be allowed to urge successfully that because the proceedings are void he may claim a larger compensation from the city. He has received the compensation which was offered him by the city

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officers for doing the work and for his damages. The city makes no complaint, but has acquiesced in the illegal acts of its officers. Under these circumstances there is certainly no equity in allowing the plaintiff to avoid the conditions of the contract under which he did the work, on the ground that the other party had no authority to make it, when such other party has performed the same on its part without objection.

In every aspect of the case, so far as the grading and filling of the street is concerned, we think the plaintiff must be deemed to have done the work voluntarily, and comes clearly within the maxim above quoted.

The case made by plaintiff in his complaint does not bring him within the rule laid down in *Dore v. The City of Milwaukee*, 42 Wis., 108. In that case the work was done by the plaintiff in pursuance of a *valid* order of the city officers, and, as the law then stood, the city was declared to be liable to the plaintiff for all damages sustained by the plaintiff by reason of the doing of such work, and the party injured was authorized to bring an original action in any court having competent jurisdiction to recover the same. When, however, the work was done in the case at bar, no action could be brought by the party injured by the doing of the work in a lawful manner; the statute of 1873 having taken away the remedy by action, and declaring that the only remedy of the party injured must be based upon the award of damages made by the proper officers, and, if not satisfied with that, by an appeal from such award in the manner provided by law.

The allegations in the complaint as to the paving of the street in front of plaintiff's lot, in 1875, do not show that there was any illegality in the proceedings of the officers in letting the contract to Martin for doing that work, and consequently do not show that the assessment made upon the plaintiff's lot for that purpose was illegal and void.

Chapter 322, Laws of 1875, authorized the board of public works of the city of Milwaukee to cause this street, with others

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in said city, to be paved with wooden block pavement, without any petition of the owners therefor, or any resolution of the common council of the city authorizing the same, and required that one-third of the cost of doing the work should be assessed against the lots fronting the streets, and two-thirds should be paid out of the ward fund; and provided for letting the work to the lowest bidder within sixty days after the passage of the act, to be finished by the 15th of November, 1875. There are no allegations in the complaint which show that the contract was not fairly let as provided in said act. It is alleged that some of the lots were assessed more than others, and that such assessments were made arbitrarily; but there is no allegation that more than one-third of the cost of the work was charged to the lots, nor more than two-thirds to the ward fund; nor is there any allegation that the lot of the plaintiff was assessed for more than its just proportion of the cost of doing such work.

The complaint does not show, therefore, that the plaintiff was injured by the unequal assessment, if any such was made. By the terms of the law, one-third was to be charged to the lot and two-thirds to the ward fund; so that it was entirely immaterial to the plaintiff how the other lots were assessed, so long as his lot was not assessed more than its just proportion, and so long as the ward fund was not charged with more than two-thirds of the cost of the work. If he has paid an assessment under these circumstances, he makes no case, either in law or equity, to recover the same back from the city. But I fail to find any allegation in the complaint that the plaintiff's lot was assessed for any part of the work, or that the plaintiff has paid any such assessment either to the city or to the contractor. How the plaintiff was injured by reason of the paving of the street in front of his lot at the expense of the ward and the other lots fronting on such street, it is difficult to imagine.

After carefully examining the allegations of the complaint

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in regard to the paving contract made with Martin, they seem to be entirely immaterial, and do not in any way help make out a cause of action for the recovery of damages for raising the grade of the street. These allegations do not show that the plaintiff was put to any cost or expense, or that he has paid any tax or assessment on his lot for such pavement; nor is there any claim that he sustained any damage by reason of the paving of such street, except, perhaps, so far as the paving was a part of the filling up of the street to the changed grade. The question of the constitutionality of the law authorizing such pavement is therefore of very little importance in determining this case.

By the Court. — The order of the county court is affirmed.

RYAN, C. J., took no part.

DOWNER, Administrator, vs. HOWARD.

Appeal from Probate Court.

After more than sixty days from the making of an order by a county court allowing an account against an intestate estate, A. asked leave to appeal from the order, stating facts to explain the delay, and also stating that he was the sole heir-at-law of the intestate, as the sole ground of his claim to be aggrieved by the order. On the hearing of the petition, it appeared that A. was not, but one N. was, the sole heir-at-law of the intestate; but the county judge, at the close of the hearing, announced orally that he would grant the prayer of the petition. Afterwards A. filed what purported to be an assignment to him of N.'s interest in the estate, dated some days before the verification of A.'s petition, but not referred to therein, nor used at the hearing; and the adverse party had no opportunity to contest the validity or effect of such alleged assignment. The circuit court subsequently made an order allowing A. to appeal. *Held*, error: A. having shown no right to appeal, at the hearing of his petition, and having been guilty of bad faith and laches.

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APPEAL from the Circuit Court for *Milwaukee* County.

The case grows out of the divorce suit of *Howard v. Howard*, which was before this court on appeal from the judgment therein, and is reported under the title of *Downer, Adm'r, v. Howard*, 44 Wis., 82. On that appeal the judgment of the circuit court, directing James Howard, the defendant, to pay certain sums of money to the attorney of Mrs. Howard, for counsel fees and expenses of the litigation, was affirmed.

The county court allowed the account of such attorney against the estate of Mrs. Howard to the amount of that judgment.

No appeal having been taken from such allowance within sixty days, *James C. Howard* filed his petition in the circuit court for leave to appeal therefrom. The petition states various reasons why the appeal was not taken within sixty days. It also states that the petitioner is the sole heir-at-law of Mrs. Howard, who died intestate; and this is the only averment showing that he could possibly have been aggrieved by the order of the county court from which he sought to appeal.

On the hearing of the petition it was proved that the petitioner was not the heir-at-law of Mrs. Howard, but that one Newson was such heir. The circuit judge announced his decision orally, granting the prayer of the petition. Some days afterwards, and before the order allowing the appeal had been reduced to writing and filed, counsel for *Mr. Howard* presented to the court an instrument purporting to be an assignment from Newson to *Howard* of his interest in Mrs. Howard's estate.

This appeal is from the order of the circuit court allowing an appeal by *James C. Howard* from the order of the county court allowing the claim of Mrs. Howard's attorney against her estate.

Frank B. Van Valkenburgh, for the appellant.

For the respondent, there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Cary*.

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LYON, J. The petition for leave to appeal from the order of the county court allowing the account of Mrs. Howard's attorney should have been denied. Under the allegations of his petition, the respondent, *James C. Howard*, was not a party aggrieved by the order of the circuit court, unless he was the heir of Mrs. Howard. Such heirship was disproved on the hearing of the petition. Hence, he was not a party aggrieved, and could not appeal. R. S., 1984, §§ 4035, 4039.

It does not appear that the instrument purporting to be an assignment by Newson of his interest in Mrs. Howard's estate to the respondent was used on the hearing of the petition, or that the administrator ever had opportunity to contest its validity, or that the order allowing the appeal was based upon it. The order merely recites that leave was granted to file the instrument, and it satisfactorily appears from the record that it was not used on the hearing of the petition.

The alleged assignment by Newson bears date December 2d, the petition was verified December 9th, and it was presented to the court and heard December 16th. The fair inference is, that when he verified the petition the respondent knew that he was not the heir of Mrs. Howard. He was guilty, therefore, of bad faith and laches by claiming as heir and failing to disclose the assignment. Because of such bad faith and laches he is not entitled to the favorable consideration of the court in a matter resting somewhat in discretion.

The respondent having shown no right to appeal, it is quite immaterial whether the account of the attorney was or was not properly presented and allowed, and we need not consider that question. But it may not be improper to say that the record of the former appeal discloses that the attorney is fairly entitled to recover a large portion if not the whole of the sum allowed him by the county court.

By the Court. — The order of the circuit court is reversed, and the cause remanded with directions to that court to deny the petition of the respondent.

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SMITH VS. EHNEET.

(1, 2) *Proof of signature to written instrument, when required.* (3) *When denial to be made.* (4) *What errors will not reverse.* (5) *Comparison of papers to prove signature.*

1. In an action upon a written instrument, plaintiff can be put upon proof of the genuineness of defendant's signature to the instrument, under the statute, only by a *specific* denial thereof by affidavit or verified answer; and a denial by *inference* is not sufficient.
2. Thus, in this action upon a promissory note which purported to be signed by defendant as maker, his answer alleging, on information and belief, first, that if the note was made by him at all, it was made by mistake on his part, through plaintiff's fraud and without consideration; and secondly, that the note was a *forged* instrument — *held*, not to be sufficient to put plaintiff on proof of defendant's signature; the word "forged," as used in the answer, being applicable to the note if written, in whole or in part, over defendant's genuine signature, without his consent.
3. Unless the denial is made before the trial is commenced (and perhaps before the cause is noticed for trial), it cannot be made at all except upon leave of the court first obtained.
4. Plaintiff not being required by law to prove the signature, specific errors in the admission of evidence offered by him for that purpose cannot be alleged by defendant to reverse the judgment.
- [5. Where papers signed by defendant had been made part of the record of a former trial of this action, and were treated by both parties as in evidence on the trial here in question, *it seems* that if the genuineness of defendant's signature to the note in suit had been put in issue, experts, as witnesses for the plaintiff, might properly have been permitted to compare the signature to the note with the signatures to such papers. Per TAYLOR, J.]

APPEAL from the Circuit Court for *Waukeesh*a County.

The case is thus stated by Mr. Justice TAYLOR:

"This action is upon a promissory note, which is set out at length in the complaint, and purports to have been signed by the defendant, bearing date April 20, 1870, for the sum of \$150, payable five months after date, to the plaintiff or bearer, with interest at the rate of ten per cent. per annum. The plaintiff further alleges that he is the lawful holder and owner

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of the note so set forth, and that the defendant is justly indebted thereupon in the sum of \$150, principal, together with interest thereon from April 20, 1870, at the rate of ten per cent. per annum, and demands judgment for that amount.

"The defendant answered: *First*, in substance, that he was not indebted to the plaintiff on any account, claim or demand whatever. *Second*, 'that he is informed and verily believes it true, and on his information and belief he states the fact to be, that if the note specified in the complaint in truth and in fact was made by him at all, it was so made, executed and delivered by mistake on his part, and by and through the false and fraudulent representations and impositions practiced on him, on the part and behalf of the said plaintiff, and that said note is without any consideration therefor.' *Third*, 'that he is informed and verily believes the note is a forged instrument, and that, on his information and belief, he states the fact to be that said note is a forged instrument.'

"The pleadings on both sides were verified. The jury found for the plaintiff, and, after a motion for a new trial by the defendant, which was denied, judgment was rendered for the plaintiff, and the defendant appealed to this court."

The cause was submitted for the appellant on the brief of *E. Fox Cook*.

Frank B. Van Valkenburgh, for the respondent.

TAYLOR, J. Upon the pleadings in the case there were really but two issues to be tried — whether there was any consideration for the note, and whether the defendant's signature had been obtained thereto by fraud or misrepresentation. And a third issue was made upon the production of the note in evidence on the trial; that is, whether the alteration appearing upon the face of the note was made before it was signed by the defendant. The answer of the defendant did not specifically deny the signature to the note, and for the want of such denial the genuineness of the signature was not put in issue.

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It is true, the answer alleges, upon information and belief, that the note was a forgery; but such answer is not a specific denial of the defendant's signature, within the meaning of section 92, ch. 137, R. S. 1858, now section 4192, R. S. 1878.

Notwithstanding the defendant's signature may have been his genuine signature, still, in one sense of the word "forgery," as used in the defendant's answer, it might have been a forgery by reason of its having been altered in a material part after his signature, or by having been written in the first instance over his signature, without the knowledge or consent of the defendant. This court holds that in order to put the plaintiff to the proof of the defendant's signature, or to put the fact of his signature in issue, there must be a specific denial thereof upon oath or affidavit, or verified answer; and an answer which only denies the same by inference is not sufficient. This rule is firmly established by the following decisions: *Ela v. Sprague*, 3 Pin., 323; *Schwalm v. McIntyre*, 17 Wis., 232; *State v. Homey*, 44 Wis., 615. In the last case cited the defendant asked leave to amend his answer "so as to deny under oath the execution of the bond, but not to deny that the name attached was his signature." The court refused to allow the amendment, and this court, in sustaining the ruling of the court below upon this point, says: "Standing alone the proposed amendment was entirely too general, vague and uncertain to render it the duty of the court to allow it." Nor is it sufficient to put the plaintiff to the proof of the defendant's signature to the contract upon which suit is brought, that the defendant, after plaintiff has made his proofs, goes upon the stand as a witness in his own behalf and denies such signature. The object of the statute is to relieve the plaintiff of the necessity of proving, on the trial, the signature of the defendant to the contract upon which the action is based, unless the same shall have been denied upon oath.

The statute would be a snare to the plaintiff, if upon the trial, and after his proof is in, he can be called upon to prove

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a signature which is then for the first time denied by the defendant, as the statute requires. If such a rule were adopted, the plaintiff would always be compelled to come to the trial prepared with his proof of signature, or take the risk of being unprepared to prove his cause of action if the defendant should conclude to deny his signature at any time during the course of the trial. The reasonable rule is, that the signature must be denied before the trial is commenced, and perhaps before the cause is noticed for trial; otherwise such denial cannot be made except upon leave of the court first obtained for that purpose. Any other rule would render the statute wholly ineffectual in accomplishing the purposes for which it was enacted.

Notwithstanding the signature of the defendant to the note in question was not put in issue by the pleadings, a very large part of the testimony offered by both sides on the trial was given by the one to prove the signature, and by the other to disprove it; and some of the exceptions taken by the defendant, and upon which he relies in this court to reverse the judgment, were exceptions to the evidence of the plaintiff given upon that point. We think the defendant cannot avail himself of these exceptions upon this appeal. If he could, my own opinion is that the exceptions were not well taken. The plaintiffs' witnesses to prove the signature to the note were, to a certain extent, experts, and were permitted, under objection, to compare the signature to the note in question with two other signatures of the defendant, which were admitted, in open court, to be his genuine signatures, and which signatures were affixed to two papers attached to the record as exhibits; and although it does not appear that they were formally offered in evidence by either party on this trial, they had been offered in evidence and made a part of the record in a former trial of this case; and I think these papers were treated by both parties on this trial as in evidence, and before the jury as competent evidence; and, in that view of the case, it was not error to

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allow the comparison of the signatures by the witnesses, within the rule laid down by this court in the cases of *Pierce v. Northey*, 14 Wis., 9, and *Hazleton v. The Union Bank*, 32 Wis., 34-47.

Upon the real issues made by the pleadings there was evidence upon both sides. Upon the part of the plaintiff there was abundance of evidence to sustain the verdict upon all the grounds complained of. The note itself was presumptive evidence of a sufficient consideration, and in addition to that the plaintiff testified that the note was given for the purchase price of sheep and wood sold by him to the defendant. Upon the issue of fraud in obtaining the note no evidence was given by the defendant, he insisting that he never gave the note at all. Upon the question of the alteration appearing on the face of the note, the plaintiff swore it was made before it was signed by the defendant, and there was no evidence to contradict his testimony on this point, unless the evidence of the defendant that he never signed the note in any shape can be considered as contradicting that evidence; and, upon the question of the signature of the defendant, if it had been in issue in the case, there was certainly as much evidence in favor of its genuineness as there was on the other side.

We are unable to understand how the statute of frauds can be invoked by the defendant as a defense to this note. We have carefully examined all the points taken by the learned counsel for the defendant, the instructions asked by him and refused by the court, and the instructions given by the court and excepted to by the defendant, and are unable to find any error which has intervened to the prejudice of the defendant. On the whole record we are unable to say that the verdict is not sustained by the evidence; and, the jury having found against the defendant, their verdict must stand.

By the Court.—The judgment of the circuit court is affirmed.

Durbin vs. Platto and others.

DURBIN VS. PLATTO and others.

Foreclosure of tax certificate.

So much of ch. 181 of 1872 as authorizes an action to foreclose a tax certificate, is valid; and in such action the complaint need not set out the proceedings antecedent to the certificate, nor allege that no proceedings at law for the same purpose have been taken.

APPEAL from the County Court of *Milwaukee* County.

Action to foreclose tax certificates, under ch. 181 of 1872. In respect to each certificate, the complaint alleges the sale of the land, specifying the date of such sale; the taxes for which and the officer by whom the sale was made; the purchaser; the amount bid, and that the same was the amount due on the land for said taxes, etc.; the execution of the certificate; the subsequent assignment and transfer thereof for value; the facts that plaintiff is the present owner and holder, and that no part of or interest in the land has been redeemed from the sale; the amount due and in arrear to plaintiff upon the certificate, and that he has a lien upon the land for that amount and for the costs of enforcing the lien; and that plaintiff has elected, and thereby declares his option to be, to foreclose said certificate by action as in the case of a mortgage upon real estate, in lieu of taking a tax deed of said land, pursuant to the statute. The complaint then states that the defendant Jacob Van Vechten Platto is the owner of said land, subject to the lien of said certificates, and that his wife, *Mary Platto*, and certain other persons named as defendants, have or claim each some interest or lien, and that such interest or lien is subordinate to the lien of said certificates. The prayer is for a judgment "determining the amount due the plaintiff for principal, interest and costs, and directing that, pursuant to the statute, the said land, or so much thereof as shall be sufficient to satisfy the lien of said certificates, with interest and costs, and the subsequent taxes and tax liens, if any, thereon, and

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which may be sold separately without material injury to the parties interested, be sold by or under the direction of the sheriff of Milwaukee county, as in the case of the sale of mortgaged premises upon the foreclosure of a mortgage upon real estate, and that out of the moneys arising upon said sale, and properly applicable thereto, the plaintiff may be paid the principal and interest due upon said several certificates and the costs of this action, or so much thereof as the proceeds of such sale will pay after deducting the costs and expenses of sale, and after paying or redeeming, as the case may require, all subsequent outstanding taxes and tax liens upon said land; that any of the parties to this action may become purchasers at such sale; that such sale be not made until one year after the date of said judgment, unless all the parties to this action shall consent to an earlier sale; and that the said sheriff shall execute and deliver to the purchaser or purchasers at such sale, his, her or their legal representatives or assigns, a deed or deeds of conveyance of the land sold, and that then and in that case the defendants, and all persons claiming under them or either of them, subsequent to the commencement of this action, may be barred and foreclosed of all right, title and equity of redemption of, in and to the same; and that the plaintiff may have such other and further relief," etc.

The defendant *Mary Platto* demurred to the complaint as not stating a cause of action; and the plaintiff appealed from an order sustaining the demurrer.

For the appellant, there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson*.

The cause was submitted for the respondent on the brief of *J. V. V. Platto*. He contended, 1. That the complaint should show a compliance by the taxing officers with all the conditions of law necessary to give them jurisdiction to make the tax sale. Blackw. T. T., 1st ed., 584-596; Cooley on Tax., 325-7; *Eaton v. Lyman*, 33 Wis., 35, 39; *Stewart v. McSweeney*, 14 id., 468, 472; *Whitney v. Marshall*, 17 id., 174. 2. That

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the complaint should have stated whether any proceedings had been had, at law or otherwise, to recover the amount of the tax (Moak's *Van Santv. Pl.*, 3d ed., 232, 234), and without that allegation it was fatally defective. 4 Paige, 551; 1 Clarke Ch., 9. 3. That the complaint should allege notice to the owner or occupant of the land that an action would be commenced, etc., as required by ch. 44 of 1870. See also ch. 181 of 1872, ch. 344, P. & L. Laws of 1871, and sec. 1175, R. S. The statute requiring notice is a remedial one; the mischief to be guarded against is the same whether the holder of the certificate elects to take a deed or foreclose; and the foreclosure act does not exempt him from the duty of giving notice. See *State ex rel. Knox v. Hundhausen*, 23 Wis., 510; *Curtis v. Morrow*, 24 id., 664. 4. That the property had been once sold to satisfy the tax, and the title divested, leaving the owner only an equity of redemption (R. S., sec. 1140); and it was not competent for the legislature to provide for selling the land a second time to enforce the same charge upon it. *Smith v. Van Dyke*, 17 Wis., 208; *Smith v. Ludington*, id., 334; *Shephard v. City of N. Y.*, 13 How. Pr., 286.

ORTON, J. This is a proceeding to foreclose a tax certificate under section 1, ch. 181, Laws of 1872. This section provides for such foreclosure, "as in the case of a mortgage," and "that all the rules of law and practice relating to the foreclosure of mortgages by action, as to the persons necessary and proper to be made parties to such actions, the decree of sale and foreclosure therein, the rules of pleading and evidence therein, the right of the plaintiff to be subrogated to the benefit of all liens upon the premises," etc., shall prevail.

These provisions sufficiently answer the point of no notice being alleged in the complaint; for the proceeding has to be commenced by *summons*, and other proper notices are to be given, if necessary to affect other parties, as in foreclosure; and in such a foreclosure the proceedings antecedent to the

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certificate of sale need not be set out, any more than the transactions of the parties antecedent to the mortgage, and which resulted in the giving of the mortgage, need to be set out in a complaint for the foreclosure of such mortgage.

This is the only law which authorizes the bringing of any action, either legal or equitable, to establish and enforce a tax certificate and obtain the legal title of the lands, and this remedy is "in lieu of taking a tax deed," and it is therefore unnecessary to allege that no proceedings at law for such purpose had been commenced, or that there is no adequate remedy at law.

The only question remaining is as to the constitutionality of the statute authorizing this proceeding. It is not perceived in what respect this statute affects unfavorably the rights of the owner of the lands. It extends the time of redemption, and admits of all possible defenses to the foreclosure by reason of any antecedent illegal proceedings in the assessment and taxation, and finally bars and forecloses the equity of redemption. It is contended that the statutory proceeding is liable to the same objection as the proceeding to foreclose a street commissioner's certificate under section 3, ch. 338 of the Local Laws of 1856, which is condemned in *Smith v. Van Dyke and others, Adm'rs of Rogers*, 17 Wis., 208. In that case there would have been two tax sales — one to the city, which had bid in the lands for the special assessment, and the other to the plaintiff under his decree, and these two antagonistic; and none of the reasons given in that case are applicable to this; and the same may be said of the subsequent case of *Smith v. Ludington and others*, id., 334. Here there is but one tax sale as such, and this proceeding, "in lieu of taking a tax deed," is a cumulative remedy to establish and enforce such tax sale, and foreclose the equity of redemption. We think this statute is valid, and the complaint sufficient.

By the Court. — The order of the county court sustaining the demurrer to the complaint is reversed, with costs, and the cause remanded for further proceedings according to law.

Wright vs. Fallon.

WRIGHT VS. FALLON.

APPEAL FROM JUSTICE'S COURT. *Unsigned affidavit for appeal confers no jurisdiction.*

1. The circuit court cannot take jurisdiction of an appeal from a justice's court without the statutory affidavit, made by the appellant or his agent (R. S., sec. 3754); and a substantial defect in the affidavit cannot, therefore, be waived or amended in that court.
2. The signature of the affiant is essential to an affidavit. Whether his name *written by himself* in the body of the affidavit is sufficient, *quære*.
3. A paper in the form of the statutory affidavit, purporting to be made by the appellant, was returned by the justice with his certificate that it was subscribed and sworn before him. It was not subscribed, and there is nothing in the record to show that the appellant's name in the body of it was in his own handwriting; but he appears to have signed the notice of appeal and the undertaking, on the same sheet with the affidavit. *Held*, that the affidavit was insufficient.

APPEAL from the Circuit Court for *Waukesha* County.

This action having been commenced in a justice's court, and a judgment having been there rendered against the defendant, a notice of appeal was filed and served in his behalf, and the justice made a return to the circuit court as upon an appeal. After the cause had been called in that court, and a jury impaneled, plaintiff moved to dismiss the appeal upon the ground that the affidavit on appeal was not signed by the defendant. Defendant's counsel thereupon proposed that defendant, who was then in court, should be permitted to sign the affidavit, *nunc pro tunc*. The court held that no such amendment could then be made, and made an order dismissing the appeal. Defendant appealed from the order.

The cause was submitted for the appellant on the brief of *Cook & Carney* and *J. V. V. Platto*. They contended, 1. That defendant should have been permitted to sign the affidavit on the trial. The proposed amendment did not involve

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the body and substance of the affidavit, but was matter of mere form; and *Chinnock v. Stevens*, 23 Wis., 396, does not apply. *Lederer v. Railway Co.*, 38 Wis., 244; *Re Howard*, 9 Eng. Rep., 436; *Lawton v. Kiel*, 51 Barb., 30; *Bunce v. Reed*, 16 id., 348; *Dexter v. Hoover*, 2 Cow., 526; *Cutler v. Rathbone*, 1 Hill, 204; *Goodall v. Demarest*, 2 Hilt., 534; *Laimbeer v. Allen*, 2 Sandf. S. C., 648. 2. That where the *jurat* is subscribed by the officer who administered the oath, especially where the affidavit begins with the name of the party making it, such affidavit has uniformly been held good. *Haff v. Spicer*, C. & C. Cas., 495; *Haff v. Spicer*, 3 Caines, 190; *Millius v. Shafer*, 3 Denio, 60; *Jackson v. Virgil*, 3 Johns., 540; *Soule v. Chase*, 1 Rob., 222, 234; *Hitsman v. Garrard*, 16 N. J. Law, 124; *Shelton v. Berry*, 19 Tex., 154; *Clarke v. Sawyer*, 3 Sandf. Ch., 352; *People ex rel. Kenyon v. Sutherland*, 16 Hun, 192, 195; and cases above cited. 3. That the objection to the affidavit was waived by plaintiff's subsequent proceedings in the action. *Bell v. Olmstead*, 18 Wis., 69; *Aetna L. Ins. Co. v. McCormick*, 20 id., 265; *Barnum v. Fitzpatrick*, 11 id., 81; *Tallman v. McCarty*, id., 401; *Upp. Miss. Transp. Co. v. Whittaker*, 16 id., 220; *Keeler v. Keeler*, 24 id., 522; *Blackwood v. Jones*, 27 id., 498; *Anderson v. Coburn*, id., 558, 564; *Grantier v. Rosecrance*, id., 488; *Baizer v. Lasch*, 28 id., 268, 271; *Ins. Co. v. Sanford*, id., 257, 263-4; *Northrup v. Shephard*, 26 id., 220.

For the respondent, there was a brief by *Sumner & Street*, and oral argument by *Mr. Street*. They cited the following authorities: 1 Whitt. Pr., 338; 1 Abb. Pr., 5, note m; 2 Barb. Ch. Pr., 604; *Mosher v. Heydrick*, 30 How. Pr., 169; *Hathaway v. Scott*, 11 Paige, 173; *Miller v. Munson*, 34 Wis., 579; *Chinnock v. Stevens*, 23 id., 396; *Wearne v. Smith*, 32 id., 414.

RYAN, C. J. The circuit court could not take jurisdiction of the appeal without the statutory affidavit. A substantial

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defect in the affidavit could, therefore, be neither amended nor waived in that court; and the only question here is, whether the proper affidavit was returned by the justice of the peace.

The affidavit may be made by the appellant or by his agent. R. S., sec. 3754. The justice returned a paper in the form of the statutory affidavit, purporting to be made by the appellant, certified by the justice to have been subscribed and sworn before him. The paper is not signed by the appellant or by any one for him. The justice's *jurat* is, therefore, on its face, partially untrue and wholly unreliable. It would be unsafe to hold, on the evidence of the paper alone, that any one made oath to it, or, if any one, who.

It is true that, on the same sheet of paper, the appellant appears to have personally signed the notice of appeal and the undertaking. That may imply his intention to sign and make the affidavit, but not that he did so. The justice certifies equally to the oath and to the signature, and was just as likely to dispense with the one as with the other. Upon an indictment for perjury, the paper would not be evidence that an oath had been administered. Neither is it here. *Re Eady*, 6 Dowling, 615.

There are some cases in New York and elsewhere which hold the deponent's signature to an affidavit unnecessary. *Haff v. Spicer*, 3 Caines, 190; *Jackson v. Virgil*, 3 Johns., 540; *Millius v. Shafer*, 3 Denio, 60; *Soule v. Chase*, 1 Robertson, 222; *Hitsman v. Garrard*, 1 Harrison, 124. But such a rule is essentially dangerous, tending to encourage not carelessness only but fraud; and even in New York the better rule appears to be that the signature is essential. *Hathaway v. Scott*, 11 Paige, 173; *Laimbeer v. Allen*, 2 Sandford S. C., 648.

The question does not arise here, whether the deponent's name, written by himself in the body of an affidavit, is a sufficient signature; for there is nothing in the record tending to show that the appellant's name in the body of the paper purporting to be his affidavit, is in his own handwriting.

Platto vs. Geilfuss.

By the Court.—The judgment of the court below is affirmed.¹

PLATTO VS. GEILFUSS.

LIBEL. *Words construed and held not actionable.*

P., a citizen of Milwaukee, agreed with a creditor in another city that the latter should draw on him for the amount due, through a Milwaukee bank. The draft was sent to such bank, and, without having presented it to the drawee, the cashier of the bank sent it back to the drawer with these written words: "We return unpaid draft [describing it]. He [the drawee] pays no attention to notices." In an action by P. against the cashier for libel, *Held*,

1. That these words (notwithstanding *innuendoes* in the complaint to enlarge their meaning) must be construed to mean merely that plaintiff paid no attention to notices given him *in regard to that draft*.
2. That, as plaintiff was only bound to accept and pay the draft *on presentation*, the words do not impute to him any want of integrity, and are not actionable *per se*.

APPEAL from the County Court of *Milwaukee* County.

Action for libel. The alleged libelous words, and the circumstances under which they were written, will appear from the opinion. The circuit court sustained a demurrer to the complaint as not stating a cause of action; and plaintiff appealed from the order.

The cause was submitted for the appellant on the brief of *J. V. V. Platto*.

For the respondent, there was a brief by *Jenkins, Elliott & Winkler*, and oral argument by *D. S. Wegg*.

COLE, J. By way of inducement, the complaint states that the plaintiff was an attorney practicing law in Milwaukee, having dealings with the firm of H. Campbell & Co., law

¹ *Lederer v. C., M. & St. Paul Railway Co.* [38 Wis., 244], was overlooked in writing this opinion. If there be a conflict between the cases, which may be a question, this must be taken to overrule that.

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publishers in New York city; and that he had purchased of that firm books and publications to the amount of \$11. It is stated that it had been agreed between the firm and the plaintiff that the firm should draw on him for that amount, through one of the banks in Milwaukee; and that the firm did draw, sending the draft to the Bank of Commerce in Milwaukee for presentation to and acceptance and payment by the plaintiff. It is then alleged that the bank received this draft, but did not notify the plaintiff of its receipt, nor present the same to him, and without his knowledge returned it as dishonored to the drawers. The defendant, the cashier of the bank, in returning the draft, wrote these sentences, which are complained of as libelous: "We return unpaid draft of J. V. V. Platto for \$11. He pays no attention to notices."

Now the question arising on the demurrer is as to the character of this communication; in other words, can it be said to be defamatory or scandalous? On the part of the plaintiff it is claimed that it is. He insists that the language used necessarily imputes to the plaintiff unworthy motives and dishonest conduct, impeaching his business integrity, and tending to bring him into public hatred, contempt and ridicule. If such is the character and tendency of the communication, there can be no doubt but that it is libelous within the decisions of this court. See *Cramer v. Noonan*, 4 Wis., 231; *Brown v. Remington*, 7 id., 462; *Lansing v. Carpenter*, 9 id., 540; *Wilson v. Noonan*, 23 id., 105; *Cary v. Allen*, 39 id., 481; *Kimball v. Fernandez*, 41 id., 329; *Cottrill v. Cramer*, 43 id., 242. But we do not think the communication is of that character, or can possibly have any such mischievous consequences as are ascribed to it. In substance, the defendant writes: "We return unpaid the draft which you drew upon the plaintiff. He pays no attention to notices which we have sent to him about it." Now what disparaging or damaging imputation is conveyed in this language? None that we can perceive. The words do not impute a want of integrity or

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honesty on the part of the plaintiff in his dealings and business transactions. They mean and naturally imply this and nothing more, that the plaintiff pays no attention to notices which the bank has sent to him that it holds an unaccepted draft drawn upon him.

The language does not fairly imply that the plaintiff refused to accept on presentation, and pay, a draft he had agreed or was under obligation to accept and pay. If this were the meaning of the communication, we should have to inquire whether it was libelous to write of a lawyer that he did not pay his debts, where no special damage was alleged. But no such meaning can be given this communication; for it is not said that the plaintiff does not pay his debts, or that he will not accept and pay, on presentation, a draft drawn upon him. But this is the charge, that the plaintiff pays no attention to notices sent him that the bank holds an unaccepted draft drawn upon him. If the bank held such a draft, its duty obviously was to present it for acceptance by the drawee, and not send notices about it; and all that the drawee was bound to do was to accept and pay the draft on presentation by a person entitled to receive the money upon it. But he was under no obligation to pay attention to notices sent him about it. And to write that a lawyer pays no attention to a notice which he is under no obligation in law or morals to regard, cannot, as we see, have any injurious tendency *prima facie*, and therefore is not libelous. With this construction of the matter written—and we think it will fairly bear no other interpretation,—we are compelled to hold that it is not actionable. There are innuendoes in the complaint which impute to the writing an entirely different meaning from the one we have given it; but, of course, its meaning cannot be enlarged by innuendo in this manner.

We therefore think the demurrer to the complaint was properly sustained.

By the Court.—Order of the county court affirmed.

Feiten vs. The City of Milwaukee.

FEITEN VS. THE CITY OF MILWAUKEE.

Injuries from abandoned proceedings to condemn land.

1. Where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover only damages resulting to him from *wrongful acts* done by the corporation in the course of such proceedings.
2. Complaint that on the 26th of April, 1875, the defendant city concluded that certain premises of defendant, on which was a dwelling house, were necessary for a public street; that, on application of the city, a jury was appointed May 3d of the same year, to determine the necessity of the taking, and promptly reported it necessary, but the city *unnecessarily* delayed further action until October 4, 1875, when it confirmed the report of the jury, and directed the board of public works to make an assessment of benefits and damages; that on November 8th, 1875, the condemnation proceedings were abandoned by resolution of the common council; and that, by reason of the pendency of those proceedings and the public knowledge thereof, plaintiff had been unable to rent the premises, to her damage, etc. *Held*, on demurrer,
 - (1) That the *facts* averred do not show that the delay of the city to complete the condemnation proceedings was unnecessary; and a general averment to that effect is not sufficient.
 - (2) That mere delay in such proceedings, without any element of malice or want of probable cause for the condemnation, would probably not be a cause of action in any case.
 - (3) *It seems* that if plaintiff had leased the premises, covenanting with the lessee for their quiet enjoyment, any damages recovered of him by the lessee for breach of that covenant, caused by the taking of the land by the city, would have been a valid claim in plaintiff's favor against the city. *Driver v. Railway Co.*, 32 Wis., 569.
3. The complaint also alleged subsequent condemnation proceedings of the city, including the appointment and affirmative report of a jury, confirmation of such report, and an order made for an assessment of benefits and damages; that in the course of these proceedings the board of public works, pursuant to a resolution of the common council, caused public notice to be given that the building would be sold at public auction, and afterwards entered on the land and sold the building; that some two months afterwards the city abandoned the proceedings; and that, in consequence of these proceedings, persons were deterred from renting the premises, and they had become depreciated in value, to plaintiff's damage, etc. *Held*, that the only *wrongful act* alleged is

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the entry upon plaintiff's premises and attempted sale of the house; and that, while this may show a cause of action *quare clausum fregit*, it does not show any ground of injury by reduction of the rental value of the premises, which is the *gravamen* of the present action.

4. *Van Valkenburgh v. Milwaukee*, 43 Wis., 574, distinguished from this case.

APPEAL from the County Court of *Milwaukee* County.

The complaint is sufficiently stated in the brief of counsel for plaintiff, as follows:

"The complaint is in trespass on the case. Plaintiff is the owner of a certain lot in the twelfth ward of the city, and on the lot there are valuable improvements, among which is a large two-story frame building used for business and dwelling purposes. On April 26, 1875, the city concluded that that part of said premises on which the house is situated became necessary for opening a street. Upon its application, a jury was appointed May 3, 1875, to determine as to the necessity. The jury promptly reported that it was necessary, but the city unnecessarily delayed further action in the premises until October 4, 1875, when it confirmed the report of the jury, and directed its board of public works to make an assessment of benefits and damages. On November 8, 1875, the condemnation proceedings, by resolution of the common council, were rescinded and abandoned.

"The plaintiff complains that, in consequence of the proceedings so instituted, it became and was generally understood that the part of the lot on which the building is situated would be taken for the purposes of a street, and that by reason thereof she proved unable to let the premises at a fair rent during the time while such proceedings were pending, and for a considerable period thereafter, to her damage of one thousand dollars.

"For a second cause of action, the plaintiff complains that on July 16, 1877, condemnation proceedings by the city were again instituted. Notice was given, a jury appointed, a report

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made, the report of the jury confirmed, and an assessment of benefits and damages ordered. In the course of these proceedings, on February 14, 1878, the board of public works, pursuant to a resolution of the council, caused notice to be given in the official papers that the building would be sold at public auction; and on February 23, 1878, the said board, pursuant to said notice, entered the plaintiff's land, and did then and there sell the building, which was of the value of \$2,500. About two months thereafter the city again abandoned and discontinued these condemnation proceedings, in the course of which the plaintiff's building was sold as aforesaid. The plaintiff complains that in consequence of these proceedings many persons were deterred and prevented from renting the premises; that her property has become depreciated in value; and that she has been greatly injured in her rents, revenues and profits, and in the value of her real estate, to the amount of three thousand dollars."

The complaint was demurred to as not stating a cause of action; and from an order sustaining the demurrer, plaintiff appealed.

For the appellant, there was a brief by *Cotzhausen, Sylvester & Scheiber*, and oral argument by *Mr. Cotzhausen*.

D. H. Johnson, for the respondent.

LYON, J. The right of the common council to discontinue and abandon the condemnation proceedings which it had instituted, is not denied by the learned counsel for the plaintiff. He also concedes that the law governing the case is correctly stated by Judge DILLON in his treatise on municipal corporations, as follows: "Where proceedings are rightfully discontinued, the land owner cannot have a *mandamus* to collect, nor recover by action the sum that may have been estimated by commissioners; yet he may have a special action for damages for any wrongful and injurious acts of the corporation in the course of the proceedings." Section 474. This is doubt-

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less a correct statement of the law, and expresses the limits and conditions of municipal liability in such cases.

The acts must be both *wrongful* and *injurious*, or there is no liability. If a given act done in the course of the proceedings be wrongful but not injurious, or if it be injurious but not wrongful, the municipality is not liable to respond in damages therefor. If there be injury without wrong, it is *damnum absque injuria*. Any other rule would render the institution of proceedings looking to the condemnation of property for public improvements exceedingly perilous to the municipality.

This action is for the loss of rents caused by the condemnation proceedings before the same were abandoned. The only averment in the first count of the complaint, which is claimed to charge a wrongful act, is that the common council unnecessarily delayed to go on with the proceedings after the jury reported that it was necessary to take the plaintiff's land.

The jury was selected May 3, 1875. The complaint does not show when they viewed the premises or reported to the council. The council confirmed the report October 4, 1875. The word "unnecessarily," as used in the complaint, has but little significance. Whether the delay was necessary or not is to be determined from the facts in the case, and this complaint fails to state facts showing that it was unnecessary. There is nothing alleged to show that the meeting of October 4th was not the first meeting of the council at which action could lawfully be taken on the report of the jury.

But we should hesitate to hold that mere delay in such a case, although we might think it was unnecessarily protracted, would constitute a ground of action. There must of necessity be a large discretion vested in the common council as to when it will take decisive action upon any proposition. Many circumstances might intervene to delay action, and it would be difficult for the court to say how much or how little time that

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body ought to take or may reasonably take for deliberation before final action.

The proceeding was in the nature of an action to divest the plaintiff of title to and possession of property. *In re Anthony St.*, 20 Wend., 618. If an ordinary action of ejectment is brought in good faith and finally discontinued, the defendant cannot maintain an action for damages against the plaintiff, although the latter had unreasonably delayed to prosecute the ejectment suit, and thus had menaced the title of the defendant longer than was necessary. No good reason is perceived why the same rule is not applicable here. Such an assault upon the title of another, to be actionable, must be made maliciously and without probable cause. If so made, it may amount to slander of title and be actionable, and the damages may be increased by unnecessary delay in prosecuting the action. The rule is that "language concerning a thing is actionable when published maliciously, *i. e.*, without lawful excuse, if it also occasions damage to the owner of the thing." Townshend on Slander and Libel, 335, § 204. See, also, *Akerly v. Vilas*, 23 Wis., 207. In this case the elements of malice or wrong intention and want of probable cause are entirely wanting. In the absence of positive statute, it cannot be correctly said that mere delay in the prosecution of a suit or proceeding is unlawful.

It may here be observed that the plaintiff would have been entirely safe to have leased her premises with a covenant to the tenant for quiet enjoyment. Then, had the premises been taken by the city during the term, all proper damages which she might have been required to pay for the breach of such covenant would have become a valid claim against the city. Such damages would have been a proper item in the amount of damages awarded her for the taking of her property. This is the rule established in *Driver v. Railroad Co.*, 32 Wis., 569. Such a covenant would probably have removed some, if not

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most, of the difficulties in the way of leasing the premises pending the condemnation proceedings.

In *Van Valkenburgh v. Milwaukee*, 43 Wis., 574, the city had condemned the plaintiff's land for the purposes of a public park, had taken possession thereof, and had done various acts thereon injurious to the freehold. Afterwards the legislature authorized the city to abandon the condemnation proceedings, and it abandoned them. It was held that the plaintiff could recover damages for such injuries, and for the loss of possession. When the city abandoned those proceedings and restored the land it had actually taken, to the owner, the plainest principles of justice required that it should compensate him for the injuries which it had done to his possession and freehold. This case is essentially different, and demands the application of a very different principle. It is only the ordinary case of incipient proceedings to condemn property to the public use, abandoned before consummation; and in all such cases if the city does not exceed its lawful authority, to the injury of the owner, pending the proceedings, it cannot be held liable for damages which the owner may incidentally sustain by reason of the proceedings. Such is the tenure by which all property subject to be taken for public use is held.

We conclude that the first count fails to allege any wrongful act or omission on the part of the city, in respect to the condemnation proceedings, and hence that it fails to state a cause of action.

The only wrongful act alleged in the second count of the complaint is the entry upon the premises and the attempted sale of the house. We have been referred to no provision in the charter of Milwaukee now in force authorizing such entry and sale. We assume the entry to have been unlawful and the attempted sale void. The entry may have given the plaintiff a cause of action *quare clausum fregit*, but this is not such an action. We are unable to perceive how such entry and attempted sale could possibly affect the rental value of the

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premises; and the reduction in such rental value is the *gravamen* of this action.

We are of the opinion, therefore, that the complaint fails to state a cause of action.

By the Court. — Order affirmed.

BARKOW vs. SANGER and another.

CHATTEL MORTGAGE: (2) *Not always void when for greater sum than that due.* (3) *Not avoided by mortgagor's sale of part of the chattels without mortgagee's consent.* (7, 8) *Fraudulent intent for the jury.*

SPECIAL VERDICT: (4, 5) *Whether evasive: When objection that it is not responsive, to be taken.* (5, 6) *Verdict construed.*

REVERSAL OF JUDGMENT: (1) *Where all the evidence not preserved.* (9, 10) *For instructions not excepted to when given.*

1. Where the bill of exceptions does not contain all the evidence, the judgment will not be reversed upon an objection first taken here, which might have been shown by such bill to be groundless, if it had been taken in the court below.
2. The mere fact that a chattel mortgage was given for a sum greater than was due the mortgagee at the date thereof, is not sufficient to render it void in law. *Butts v. Peacock*, 23 Wis., 260, and *Blakeslee v. Rossman*, 43 id., 123, distinguished.
3. A sale of mortgaged chattels by the mortgagor, without knowledge or consent of the mortgagee, will not invalidate the mortgage.
4. Where wood was seized on a judgment two days after the judgment debtor had given a mortgage thereof, the jury, in a suit by the mortgagee against the judgment creditor, were asked to find specially whether the debtor, after he gave the mortgage, continued to sell and deliver wood, in the usual course of his business, out of that mortgaged; and they answered that some of the mortgaged wood was sold, but probably without the mortgagor's knowledge. *Held*, that the answer was not evasive.
5. The jury were further asked, whether it was *understood* between the mortgagor and the mortgagee, when the mortgage was given, that the former might sell the mortgaged wood, and dispose of the proceeds in the usual course of his business; and they answered, "There was no agreement made." *Held*,

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- (1) That if the answer was not responsive to the question, the objection should have been taken when the verdict was received.
- (2) That an "understanding" between two parties to a contract as to what rights each shall have thereafter in the subject matter of the contract, is an "agreement."
- (3) That as the court below, in its instructions on submitting the question, correctly used the words "understanding" and "agreement" interchangeably as synonymous, it cannot be assumed that the jury used the latter word evasively.
6. The court submitted to the jury the question whether the mortgage was given "*without consideration and*" for a certain fraudulent purpose as to creditors; and the jury answered, "It was not." *Held*, that, in view of the instructions given (for which see the opinion), this answer must be treated as merely negating the fraudulent purpose.
7. The question of fraudulent intent in such a case is usually one of *fact*, for the jury; and it was properly submitted to the jury in this case.
- [8. Whether, under the statute (R. S., sec. 2323), it is always necessary, in taking a special verdict in cases of this kind, to submit the question of fraudulent intent to the jury, even where the court may, upon the evidence, be justified in directing them what answer to find, *quære*.]
9. A motion for a new trial of an action, made at the term of trial, based in whole or in part upon alleged errors in specified instructions, brings up such instructions for review, upon appeal from a judgment rendered upon the verdict after a new trial had been denied.
10. But where exceptions are not taken *at the trial*, the judgment will not be reversed for instructions technically erroneous, unless it clearly appears from the whole record that appellant was prejudiced by them.

APPEAL from the County Court of *Milwaukee* County.

The case is thus stated by Mr. Justice TAYLOR:

"This is an action to recover the value of certain personal property. The plaintiff claimed to own the same by virtue of a chattel mortgage given to him by one Gottlieb Stolper, to secure the payment of the sum of \$800, dated November 18, 1878. The defendant Sanger was sheriff of Milwaukee county, and took said property by virtue of two executions issued upon two judgments against the said Gottlieb Stolper, and in favor of the other defendant, Louis Coorsen. These judgments were entered and docketed on the 20th of November, 1878, upon two notes and warrants of attorney executed by the said Stolper

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and another to the defendant Coorsen—one on the 8th day of May, 1878, and the other on the 12th day of August, 1878. The executions were issued on said judgments on the said 20th day of November, 1878, and the sheriff levied upon said mortgaged property on the same day.

“The defendants allege in their answer that the mortgage was given without consideration, and was fraudulent and void as to the creditors of the said Stolper. No question is raised as to the sufficiency of the allegations in the answer to put in issue the validity of the mortgage as to the mortgagor’s creditors. No exceptions were taken upon the trial either to the introduction or rejection of evidence, or to the charge of the judge. The jury rendered a special verdict; [the court denied defendants’ motion to set aside the special verdict and grant a new trial, and rendered judgment in plaintiff’s favor, from which the defendants appealed]; and the only questions argued upon this appeal are questions arising upon the special verdict, and upon the refusal to grant a new trial.”

Those portions of the special verdict to which exceptions were taken, are recited in the opinion.

For the appellants, there was a brief by *Joshua Stark* and *N. Pereles & Sons*, and oral argument by *Mr. Stark*. They argued, 1. That the mortgage was void as against creditors because it was given for a greater sum than was actually due. The condition of the mortgage on file must disclose the real nature of the transaction so far as it can be disclosed, or it will not be valid against creditors. *Pettibone v. Griswold*, 4 Conn., 158; *North v. Belden*, 13 id., 376; *Hart v. Chalker*, 14 id., 79; *Younge v. Wilson*, 24 Barb., 510. Approving the doctrine of these cases, this court has indicated its opinion that such a mortgage as the one in question is void. *Butts v. Peacock*, 23 Wis., 360; *Blakeslee v. Rossman*, 43 id., 123. 2. That the mortgage was void because the description of the property therein (“one hundred cords of hard maple wood, three lumber wagons and one buggy, all being the property and in the

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possession of said Gottlieb Stolper”), was not sufficiently definite; the location not being indicated by naming the lot, ward, city, county or state, and there being no other description sufficient to identify it. Counsel also urged the objections to the special verdict, and to the instructions, which are considered in the opinion.

For the the respondent, there was a brief by *Cotzhausen, Sylvester & Scheiber*, and oral argument by *Mr. Cotzhausen*.

TAYLOR, J. The defendants based their motion for a new trial upon the following grounds:

First, because the answer of the jury to the seventh question in the special verdict is uncertain and evasive, and inconsistent with the other findings.

Second, because the answer to the ninth question is not responsive to the question, but is indefinite and evasive, and said question is not, in fact, answered.

Third, because the answer to the thirteenth question is inconsistent and in conflict with the answer to the twelfth question.

Fourth, because the answer to the sixteenth question is contrary to law.

Fifth, because the court erred in submitting the sixteenth question to the jury for their finding, the same being a question of law, instead of a question of fact.

Sixth, because the court erred in instructing the jury “that, as the mortgage was given for a good consideration, its validity as to other creditors could not be impeached, unless it was shown by the evidence that the mortgage was made to benefit the mortgagor.”

Seventh, because the special verdict is otherwise inconsistent, indefinite, evasive and imperfect, and contrary to law.

Upon the argument in this court, the learned counsel for the appellants made a point not made in the court below, that the judgment upon the special verdict should have been in

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favor of the defendants, instead of in favor of the plaintiff, because, upon the facts found by the special verdict, the mortgage was fraudulent and void in law as to creditors.

This argument was based wholly upon the fact that the special verdict finds that the actual indebtedness of Stolper to the plaintiff, at the time the mortgage was given, was only the sum of \$743.13, being the amount of two notes held by him and the accrued interest thereon; whereas the mortgage was given on its face to secure the payment of \$800, and interest thereon from the date thereof; and the learned counsel insists that because the mortgage on its face purports to have been given to secure a larger sum than was then owing by the mortgagor to the mortgagee, and does not disclose on its face that it was intended to cover any future advances to be made by the mortgagee, it is fraudulent and void in law as to the creditors of the mortgagor.

It is probably a sufficient answer to this argument, that no such position was taken in the court below on the motion to set aside the special verdict, and no motion was made for judgment in favor of the defendants upon the special verdict for that reason.

It was, we think, well argued on the part of the learned counsel for the respondent, that this argument ought not to prevail in this court, for the reason that if this position had been taken in the court below, either upon the motion for a new trial or for judgment in favor of the defendants, the respondent, in settling the bill of exceptions, would have insisted upon the insertion of the evidence bearing upon that question, and that such evidence might have shown that, notwithstanding the discrepancy between the amount mentioned in the mortgage and the amount then actually due to the mortgagee, the mortgage was given in good faith, upon the belief that it expressed the amount then actually due, or that it was agreed that the mortgagee should presently advance enough to make the indebtedness the sum of \$800.

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As the bill of exceptions does not pretend to contain all the evidence, we cannot say that there was not sufficient evidence given upon that point to satisfy the court and jury that no bad faith or fraud could be predicated upon the fact of the difference between the sum mentioned in the mortgage and the sum then actually due to the mortgagee.

The decisions in this court do not hold that a chattel mortgage which is given for a sum greater than is actually due the mortgagee is fraudulent and void in law. Neither of the cases cited by the learned counsel goes to that extent. *Butts v. Peacock*, 23 Wis., 360; *Blakeslee v. Rossman*, 43 Wis., 123. In the case first cited, the court, in discussing this point, say: "But even though it should be held that such a mortgage is not necessarily fraudulent, and that if the surrounding circumstances are such as fully to repel any idea of fraud, it may be sustained, yet when the surrounding circumstances are of directly the opposite character, the jury should be told that the mortgage is fraudulent."

This was said in a case where the mortgage on its face was for the security of \$1,100. The proof showed that only \$570 had been advanced thereon; that the mortgagee knew that the mortgagor was in embarrassed circumstances; and that the consideration of the mortgage was more than the value of the mortgaged property. It was claimed by the mortgagee that the mortgage was given to cover future advances; but the evidence showed that all the advances which had ever been made was the sum of \$570. In the other case, the question as to any discrepancy between the consideration expressed in the mortgage and the amount of the actual indebtedness was not in the case, and was not decided or intended to be decided.

As said above, we cannot, therefore, in the absence of the evidence given upon the trial, say that the jury were not justified in finding that the mortgage was given in good faith, and not for the purpose of hindering or defrauding the creditors of the mortgagor, as the evidence of the surrounding cir-

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cumstances might have been such as to repel any idea of fraud predicated upon that fact alone.

The seventh question submitted to the jury was as follows: "Did Stolper, after he gave the mortgage, continue to sell hard maple wood in the usual course of his business, and deliver the same out of the mortgaged wood?" *Answer.* "There was some of the mortgaged wood probably sold, but unbeknown to him."

We do not think, under the circumstances, this was an evasive answer to the question. It will be remembered that the mortgage was given on the 18th of November, and the defendants took the wood on the 20th of November; but one whole day had passed between the giving of the mortgage and the taking by the defendants. The evidence is not preserved in the bill of exceptions, and the answer must therefore be held to have been supported by it, and that the sales of the mortgaged wood which had been made had been made by his employees, without the knowledge of the mortgagor.

The answer amounts to this: that sales had been made in the usual course of business by the employees of the mortgagor, but not with his knowledge; that they had been permitted to sell without being expressly forbidden, and without his having actual knowledge that such sales were made. It might, perhaps, be urged that the question ought not to have been submitted to the jury unless it was accompanied by another, connecting the mortgagee with a knowledge that such sales were being made. The mere fact that the mortgagor sold the property in the usual course of his business, after the mortgage was given, would not affect the validity of the mortgage as to the mortgagee, unless he knew that such sales were being made, or had previously consented that they might be made.

The ninth question reads as follows: "Was it understood by and between the plaintiff and Stolper, at the time when Stolper gave him the chattel mortgage, that Stolper should con-

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tinue to carry on his business of selling wood, at his wood-yard, and would sell and dispose of the said mortgaged wood and its proceeds, as part of his stock in trade, in the usual course of his business and trade as a wood-dealer?" *Answer.* "There was no agreement made." This answer, the learned counsel for the appellants insists, is not responsive to the question, is evasive and indefinite, and is in fact no answer.

If the last objection be well taken, that the answer is not responsive, and therefore no answer, we think it was the duty of the defendants' counsel to have called the attention of the court to the fact when the jury rendered their verdict, and have requested the court to have again submitted the question to them for an answer. If the defendants were dissatisfied with the answer, because it stated that there was "no agreement" instead of "no understanding," we also think the objection should have been taken at the time, and the attention of the court and jury called to the supposed difference between "agreement" and "understanding." An "understanding" between the parties which would have defeated this mortgage, under the evidence in the case, must have amounted to an express agreement, for the reason that the time was so short between the making of the mortgage and the taking by the defendants that there were no acts of the parties intermediate from which an implied agreement could be inferred. The learned circuit judge, in his charge to the jury, to which no exception was taken by the counsel for the defendants, used the words "understanding" and "agreement" as synonymous. Webster defines the word "understanding" as "anything mutually understood or agreed upon."

In the case of *Fisher v. Fisher*, 5 Wis., 472, Justice COLE, in speaking of the necessity of proving an express contract between father and child to pay such child wages whilst living with the father, in order to enable the child to recover pay for his work, uses this language: "But to have done this it would manifestly have been incumbent upon him to show

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that the ordinary relation of child and parent did not subsist between him and the defendant, and that it was the *understanding* of the parties that he should have compensation for these services." Justice PAINE, in *Kaye v. Crawford*, 22 Wis., 320, a like case, in which it was held that an express contract must be shown to entitle the plaintiff to recover, says: "The testimony of the plaintiff does not show that the services for which his father gave him the team were rendered in pursuance of any agreement or understanding that they were to be paid for. On the contrary, the fair inference from his own statements is that they were rendered without any such understanding." Chief Justice RYAN, in *Tyler v. Burrington*, 39 Wis., 376-382, in speaking of how an express contract might be proved in an action for wages between parent and child, says: "If established by competent evidence, as entering into the *res gestæ*, such expectations of these parties might give color to circumstances tending to show that they ripened into a *mutual understanding* — an *express contract*." It seems to us that in view of the fact that the learned lexicographer above cited, as well as the justices of this court, have declared that the word "understanding," in the connection in which it was used in the question propounded to the jury, is synonymous with "agreement," we would hardly be justified in holding that the jury intended to evade this question by saying there was "no agreement," instead of saying there was "no understanding;" and especially as the learned judge, in his instructions to them at the time, had used the words as meaning the same thing, without criticism on the part of the learned counsel for the defendants.

We can see no force in the third objection taken to the verdict, and the counsel for the defendants made no argument to sustain it in this court.

The fourth and fifth objections relate to the sixteenth question submitted to the jury: "Was said mortgage given without consideration, and for the purpose of hindering, delay-

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ing or defrauding the creditors of said Stolper?" *Answer:* "It was not." The defendant objected to submitting this question to the jury on the ground that it was double and ambiguous; that it called for a conclusion of law, and under the testimony it could only be answered in the negative as a whole, since there was no dispute that there was a consideration for the mortgage. We think the objection that the question was double was obviated by the instructions given to the jury upon its submission. The court said:

"This is the last question, and a question propounded by the plaintiff. There is no question, gentlemen of the jury, that this mortgage was given for a consideration. . . . The only question for you to determine, in answering this question, is, whether or not it was a fair, *bona fide* transaction between the plaintiff and Stolper, with a view of securing the indebtedness of Stolper to the plaintiff, or whether this mortgage was a cover entered into by the plaintiff with Stolper with a view of benefiting Stolper, and for the purpose of defrauding, hindering or delaying the creditors of Mr. Stolper."

"If you find, as you will find as a matter of course, that the consideration was a good one, and find that it was a fair transaction between Stolper and the plaintiff, and that it was done with a view of securing and obtaining payment of that debt by the plaintiff from Stolper, and no understanding or agreement was had between Stolper and the plaintiff, by which Stolper was to derive any benefit from this mortgage, or be allowed to sell or dispose of this wood with a view of defrauding his other creditors, then your answer to this question will be in the negative; otherwise you will have to answer it in the affirmative."

Under this charge, not objected to by the defendants, the jury were instructed to answer the question as a single question, and as though that part of it which relates to the consideration were not in it; and it is clear that upon such instructions the question was treated by the jury as though it had

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been written: "Was said mortgage given for the purpose of hindering, delaying or defrauding the creditors of said Stolper?"

And, as an answer to such question, the answer given by the jury is plain and direct, and is clearly not an answer to that part of it relating to the consideration, as the court and the learned counsel for the defendant agree that the undisputed evidence showed that it was given for a consideration.

The objection that the question called for a conclusion of law and not a fact, we do not think tenable. The intent with which a sale is made or a mortgage given, when such sale or mortgage is questioned by the creditors of the vendor or mortgagor, is in almost all cases a question of fact for the jury; and it only becomes a question of law when the facts proved are such that the law conclusively presumes an intent to defraud. The question of fraudulent intent, in cases of this kind, are declared to be questions of fact by the statute. Section 2323, R. S. 1878; *Hyde v. Chapman*, 33 Wis., 391. Under our statute, in cases of this kind, it might be necessary, in taking a special verdict, to submit the question of fraudulent intent to the jury as a fact to be found in the case, in order to sustain a verdict in favor of the party alleging such fraudulent intent, even though the court might, upon the evidence, be justified in directing the jury to find such fact; but, however that might be, we see no objection to the question in this case, and certainly its submission could not injure the defendants.

Although no exceptions were taken, either at the trial or afterwards, to the charge of the judge, yet, upon his motion for a new trial made at the same term, the learned counsel for the defendants alleged, as one ground for setting aside the verdict, that the court erred in instructing the jury as stated in his sixth reason for setting the same aside. This court has held that when a motion for a new trial is made at the same term at which the action is tried, and such motion is based in whole or in part upon the ground that the judge erred in his

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instructions to the jury, such motion is equivalent to an exception to the instruction, and properly brings its correctness before this court for consideration, upon an appeal from a judgment rendered upon the verdict after such motion for a new trial is denied. *Nisbet v. Gill*, 38 Wis., 657; *Cohn v. Stewart*, 41 Wis., 527-541; *Wells v. Perkins*, 43 Wis., 160.

The exception is to a part of the charge of the circuit judge given upon his submitting to the jury the sixteenth question, and is stated in the motion to set aside the verdict, as follows: "That, as the mortgage was given for a good consideration, its validity as to other creditors could not be impeached unless it was shown by the evidence that the mortgage was made to benefit the mortgagor."

The objection is not to that part of it which relates to the good consideration, as it was admitted on the trial, and the judge charged, without any objection or exception, either at the trial or on a motion to set aside the verdict, that there was a good consideration therefor; but the objection and argument of counsel were to that part which says that the "evidence must show that the mortgage was made to benefit the mortgagor." It is possible that this remark of the learned circuit judge, if it stood alone as an independent instruction, would be subject to criticism, and not a fair statement of the law of the case. It may be true that it would be immaterial whether the arrangement was made for the benefit of the mortgagor or not, if it appeared that it was made for the purpose of hindering or delaying his creditors. The transaction might be such as not to benefit the mortgagor, and still fraudulent as to creditors; but ordinarily it would not be so, and the element of benefit to himself would enter into any arrangement to defraud his creditors.

These words, isolated, might be objectionable; but, taken in connection with the whole of the instruction given by the court to the jury upon the submission of the sixteenth question, as quoted above, we do not think they misled the jury

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upon the point raised by the question itself. The only attack made upon the validity of the mortgage, which had any evidence tending to support it, was, that there was an understanding that the mortgagor might go on and sell the property mortgaged in his usual course of business; and, in the same sentence in which the objectionable words are found, the court plainly instructed the jury, in substance, that if they found from the evidence that there was an understanding or agreement that Stolper should be allowed to sell or dispose of the mortgaged wood with a view of defrauding his other creditors, then the mortgage was void.

The exception being of a technical character, and not having been made on the trial, so that, if virtually wrong, the judge might have corrected it on having his attention called to it, we are not disposed to give it the same effect as if taken at the trial. When exceptions are not taken at the trial, this court will not reverse the judgment upon such exceptions, though technically erroneous, unless it clearly appears from the whole record that the party excepting was in fact prejudiced by the erroneous instructions. *Neanow v. Uttech*, 46 Wis., 581; *Dufresne v. Weise*, id., 290. In this case we do not think the defendants were prejudiced by the instruction, and the judgment should not be reversed for that reason.

After a careful examination of the whole record, we are of the opinion that the case was fairly tried upon the merits, and that the verdict of the jury is in all respects sufficient to justify the judgment in favor of the plaintiff.

By the Court.—The judgment of the county court is affirmed.

Watkins vs. Zwietusch and others.

WATKINS vs. ZWIETUSCH and others.

(1) *Purchase of tax title by administrator.* (2) *When assessment of benefits from city improvements void.*

1. Where an administrator purchases with money of the estate, and has conveyed to himself, an outstanding tax title upon land of his intestate, it inures to the benefit of the heir.
2. In assessing benefits to adjoining lots from a contemplated public improvement, the board of public works of Milwaukee added fifty per cent. to the estimated cost of the work to be done in front of each lot, and adopted the amount so determined as the measure of such benefits, irrespective of the actual benefit to the lot. It appears that the several lots were very differently affected by the improvement. *Held*, that there was a total failure to exercise the judgment of the board in determining the actual benefits; and the assessment was void. *Johnson v. Milwaukee*, 40 Wis., 315.

APPEAL from the Circuit Court for *Milwaukee* County.

Ejectment, for a lot in the city of Milwaukee; tried by the court without a jury. Plaintiff traced title to the heirs of Charles K. Watkins, deceased, and showed that, in a partition of the estate of said deceased, said lot was set off to himself as one of the heirs-at-law, and that he was in possession in 1876. Defendants introduced tax deeds of said lot from the city to Thomas M. Knox, for city taxes of 1861 and 1864, which deeds were recorded respectively in February, 1865, and September, 1868; also a quit-claim deed from Thomas M. Knox and wife to Caroline B. Watkins, dated December 22, 1865; also a tax deed of the same lot from the city to the defendant *Zwietusch* for taxes of 1871, recorded June 30, 1877. Their evidence also tended to show that the lot was vacant until 1876. Plaintiff thereupon showed, by the probate records of Milwaukee county, the appointment of Caroline B. Watkins (widow of Charles K. Watkins) and another person, in June, 1858, as administrators of the estate of said deceased, and that in the final account of administration said estate was charged with the amount paid Thomas M. Knox for quit-claiming his

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interest acquired by tax deed as before stated. The other evidence need not be given. The finding of the circuit court as to facts affecting the validity of the deed of 1871, is sufficiently set out in the opinion.

From a judgment in favor of the plaintiff, defendants appealed.

For the appellants, there was a brief by *Cotzhausen, Sylvester & Scheiber*, and oral argument by *Mr. Cotzhausen*.

The cause was submitted for the respondent on the brief of *E. Mariner*.

ORTON, J. It is apparent from the evidence that the respondent held the legal title to the premises in question as an heir-at-law of Charles K. Watkins, deceased, and that the tax titles of Thomas M. Knox inured to his benefit by being bought in by, and conveyed to, Caroline B. Watkins, the widow of said Charles, and one of the administrators of his estate, by the use of the moneys belonging to the estate.

The only remaining question is of the validity of the tax deed of the appellant, which is based upon special assessments of benefits by the grading and improvement of streets in the city of Milwaukee. The learned circuit judge found, as a fact proved, "that in making such assessments of benefits the said board of public works determined the amount of benefits by adding fifty per cent. to the cost of the work to be done in front of each lot and part of lot, as estimated by said city engineer, and adopted such cost as the measure of benefits, irrespective of the actual benefit to the lot." It was not found, and does not clearly appear from the evidence, whether such a pretended assessment was made upon actual view of the premises or not; and it is not material whether it was so made or not, when it is so clearly and expressly found that the amounts of such assessments were determined arbitrarily, and upon a false and illegal basis, "irrespective of the actual benefit to each lot."

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It is quite obvious from the testimony that the several lots were very differently affected by the improvement. If the assessment had been made according to law, and the actual benefit to the several lots had been at all judicially considered, then such *quasi* judicial determination might not be questionable in this collateral manner. But this assessment was made in palpable and gross violation of the law, and of common reason and justice. Here was no mere error of judgment, but the failure to exercise any judgment at all. The *actual benefit* to each lot, which is the only legal basis of such estimate and assessment, is boldly repudiated, and an arbitrary basis adopted, which precluded any consideration of such benefit or the exercise of any judgment in respect to such benefit. But it is needless to further discuss the question, when the whole subject has been so fully and so ably treated by the chief justice in *Johnson v. The City of Milwaukee and others*, 40 Wis., 315, and the identical question here involved was decided in that case. The invalidity of the assessment in that case is made to rest upon precisely the same ground of objection here, and not upon the ground that it was made without viewing the premises. But the language of the chief justice is in itself clearer and more explicit than it can be made by comment: "It does not appear that the board of public works ever viewed the premises assessed, as required by the statute." "This alone might be fatal to the assessment. But we prefer to rest the invalidity of the assessment in this case upon the ground that the commissioners of public works based the assessment upon cost, instead of the actual benefits positively and specially accruing to the property assessed, in consequence of the improvement." To say anything further would be to weaken the force of a decision perfectly conclusive of the question.

The finding of the court was sustained by the evidence.

By the Court.—The judgment of the circuit court is affirmed, with costs.

The Newhall-House Stock Co. vs. The Flint & P. M. R'y Co.

THE NEWHALL-HOUSE STOCK COMPANY vs. THE FLINT &
PERE MARQUETTE RAILWAY COMPANY.

(1) *Variance.* (2) *Nonjoinder.*

1. A variance between the contract pleaded and that proven, by which the appellant was not misled, is disregarded here.
2. Nonjoinder of a proper defendant can be taken advantage of only by answer in abatement.

APPEAL from the County Court of *Milwaukee* County.

Action for rent. The complaint was, in substance, that on or about May 1, 1878, plaintiff leased to defendant one-half of an office, known as "Office No. 5," in the Newhall House block, in the city of Milwaukee for the term of one year, at the annual rent of \$325; that defendant agreed to pay said rent in equal portions on the first day of each month, the first payment to be made on the first of June; and that, after demand, it had failed to pay the rent which became due on the first days of July, August and September, 1878, amounting to \$81.25, for which amount, with interest, etc., judgment was demanded.

The answer contained a general denial, and an averment that the tenancy was by the month, and not by the year.

The county court found as facts, that on the first day of May, 1878, plaintiff leased to defendant and one S. M. Ogden said office No. 5, for the term of one year from that date, at the annual rent of \$650, to be paid in equal portions on the first day of each month, the first payment to be made on the first of June; and that a portion of the rent which became due on the first days of July, August and September, 1878, respectively, amounting in all to \$81.25, had not been paid; and that there was due plaintiff from defendant, including interest to the date of the decision, \$83.12.

From a judgment for plaintiff in accordance with these findings, the defendant appealed.

Southmayd vs. The Watertown Fire Ins. Co.

The cause was submitted on the brief of *E. Mariner* for the appellant, and that of *Dixon & Noyes* for the respondent.

RYAN, C. J. The only exceptions taken are to the findings of the court below.

In support of these the point is made here, that there was a variance between the contract pleaded and the contract proved. It was not pretended in the court below that the appellant was misled to its prejudice, and the variance must be disregarded here. R. S., sec. 2669; *Russell v. Loomis*, 43 Wis., 545; *Delaplaine v. Turnley*, 44 Wis., 31.

Another point relied on here is the nonjoinder of a proper defendant. This avails nothing on answer in bar. It could be taken advantage of only by answer in abatement. *Markoe v. Seaver*, 2 Wis., 148; *Dutcher v. Dutcher*, 39 Wis., 651; *Plath v. Braunsdorff*, 40 Wis., 107; *Supervisors v. Van Stralen*, 45 Wis., 675.

By the Court.—The judgment of the court below is affirmed.

SOUTHMAYD VS. THE WATERTOWN FIRE INSURANCE COMPANY.

CONTRACT. (1) *Termination of employment: proof of employee's consent.*
APPEAL TO SUPREME COURT. *Rules as to printed case and brief enforced.*

1. Plaintiff, being perhaps employed by defendant as its state agent for Wisconsin for a term of one year from April 1, 1877, was notified by defendant's vice-president under date December 14, 1877, that, for reasons stated (not implying any dissatisfaction with plaintiff), the directors had concluded that at least for the next calendar year the agency for Wisconsin must be added to the duties of the person who was then defendant's state agent in an adjoining state; and added that defendant's general agent was then in the west, and would probably visit plaintiff in a few days, when "all matters relating to the future" could "be arranged between" him and plaintiff. Plaintiff immediately answered at length, expressing acquiescence in the necessity of the change, and

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giving no intimation that he should claim his salary after January 1, 1878. On the 19th of December, 1877, he sent out circulars to defendant's subordinate agents in this state, stating that on the first of January then next, the relations existing between him and them would be dissolved "by expiration of engagement;" and commending to them the state agent who was then to succeed him. *Held*, that these papers show a termination of plaintiff's employment *with his consent*; and he cannot now recover salary for the remainder of the year covered by his contract.

2. A printed case of 255 pp. and a brief for appellant of 194 pp., in this case, being constructed in gross disregard of Rules 8 and 9 of this court, the clerk is directed to allow appellant, in the taxation of costs, for only 50 pp. of case and 25 pp. of brief.

APPEAL from the County Court of *Milwaukee* County.

Action for a sum alleged to be due plaintiff upon his salary as defendant's agent for the three months ending April 1, 1878, amounting to \$375. The complaint avers that about May 1, 1877, plaintiff was hired by defendant as its agent to manage its business in this state for one year from April 1, 1877, at the agreed price of \$1,500; that he performed all the services pertaining to said employment up to January 1, 1878, when he was discharged by defendant, and prevented from fulfilling his engagement, although he had been ready and willing, etc.

The answer denied that plaintiff was employed for a year or any specific term, and set up certain counterclaims, to which there was a reply in denial.

The plaintiff being a witness in his own behalf, certain letters written to or by him were, on his cross examination, identified by him, and put in evidence by defendant. The contents of these are sufficiently stated in the opinion. At the close of plaintiff's evidence, defendant's motion for a nonsuit was denied.

There was a verdict and judgment for the plaintiff, and defendant appealed.

For the appellant, there was a brief by *Cottrill, Cary & Hanson*, and oral argument by *Mr. Cary*.

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For the respondent, there was a brief by *Flanders & Bottum*, and oral argument by *Mr. Flanders*.

COLE, J. Assuming that the plaintiff's employment was for a year from the first day of April, 1877, on the same terms as stipulated in the original contract, still we think the evidence shows that this employment was terminated by mutual consent on the first of January, 1878. This conclusion is fully warranted by the letter written the plaintiff by Gilbert, the vice-president of the company, dated December 14, 1877, the answer of the plaintiff to that letter, and the circular sent out by the plaintiff to the agents of the company in Wisconsin, of the 19th of the month. Gilbert's letter was evidently written for the purpose of notifying the plaintiff that the company intended to terminate his state agency at the end of the year; for he says, in substance, that, as the year draws to a close, the subject of the business of the company in the several states comes before the board of directors for discussion and review; that the past year has been a hard one for insurance business generally; that, owing to the demoralization of rates, the large shrinkage in values, the increase of fires and moral risk, the business of the company has been close, and "brings us all to face the fact that the strictest economy must be the order of the day;" that, "with that view of the case, our directors have concluded that Wisconsin would hardly support a general agency, and that we must add that state to the duties of Mr. Condit, at least for the year;" states that he is happy to say that they find their business in Wisconsin in a much better shape than when plaintiff took charge of the field; thanks the plaintiff for his faithful performance of all the duties of his position; assures him that it is only the necessity which rests upon the company for curtailing expenses which induces it to make a change; and closes by saying that "our Mr. Waite is now west," and will probably visit plaintiff "some time next week, when all matters relating to the future can be arranged between you."

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To this letter the plaintiff replies at considerable length on the 17th, the day of its receipt, saying: "the proposed change in the management of this agency is not a surprise, for I really anticipated the contents of your letter sooner or later." He further says that while he had spared no pains to increase the volume of business of the company and make it profitable, he was certainly conscious that his efforts were not a success; states various reasons or causes why this was so; says Mr. Condit will find the business in this field much pleasanter than if he had taken it when the plaintiff did; says he will always feel an interest in the "Watertown," which he has defended with too much zeal, and labored for too earnestly, too sincerely and too disinterestedly, not to feel an interest in it; but through the whole letter there is not one word of objection to the termination of the plaintiff's employment at the end of the calendar year, or a single intimation that he should expect or claim his salary beyond that time.

The circulars which were sent out from Milwaukee by the plaintiff to the agents under his supervision, dated December 9, 1877, commence with the following language:

"On the first of January next, the pleasant relations existing for the past two years between the undersigned and the *Watertown Fire Insurance Company* will cease, by expiration of engagement. The Wisconsin department will be consolidated with Iowa and Minnesota, under the management of Mr. E. M. Condit, Anamosa, Iowa. In parting with former officers and agents, and leaving the scene of former labors, the writer would kindly bespeak for his successor in the field—whom you will find a pleasant and efficient officer—such a continuance of the generous courtesy and hearty coöperation for the interest of the 'Watertown' as has been extended to himself in the past."

This circular was printed and sent out to the agents by the plaintiff immediately after Messrs. Waite and Condit had been to Milwaukee to arrange with him about the surrender of his

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agency and the turning over of the books and papers belonging to it. All this business was transacted without any objection on the part of the plaintiff, or claim that the company had no right to discharge him, and that he did not consent to such discharge. Now, if upon reading the letter of Gilbert of the 14th of December, and the reply of the plaintiff thereto, a doubt could remain as to whether or not the parties had mutually consented to a termination of the employment on the first of January, 1878, that doubt would surely be removed by the language of the circular and the conduct of the plaintiff, so far at least as he was concerned; for it would be difficult for him to express more clearly, by act or word, his understanding that his employment or "engagement" with the company ceased at that time.

But it is said that the plaintiff had no option about the surrender of his agency, as the company could deprive him of all authority to act for it at any time, and therefore it ought not to be presumed or inferred, from anything said or done by him, that he intended to waive his claim for his salary for the unexpired balance of the year. But the plaintiff was bound to be frank with the company in his correspondence, and he certainly should have indicated in some way, at the time the matter was under consideration, that he did not voluntarily consent to the termination of his employment before the expiration of the year, if such were the fact. Good faith and open dealing required that he should say that much to the company. But we are entirely satisfied from the evidence that the plaintiff did freely consent to the termination of his agency on the first of January, 1878, and that the claim for salary after that time was an afterthought.

Of course, after the parties had once freely consented to terminate the employment, they were bound by the decision until a new contract was made; for there is no pretense that there was any mistake, imposition or fraud in the matter, both parties having acted understandingly, with full knowledge of

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the facts. So that, without considering any other question on this branch of the case, we hold that the written testimony above referred to clearly shows that the plaintiff voluntarily consented to the termination of his employment by the company on the first of January, 1878, and has no claim for salary after that date. It follows from these views that the court below should have instructed the jury, as requested by the defendant, that upon the evidence given they must find that the plaintiff had no cause of action.

The testimony in regard to the counterclaims is so unsatisfactory and doubtful that we are unable to decide as to their merits. Another trial may disclose new facts, and enable the court intelligently to pass upon them.

The printed case contains 255 pages, the testimony being given in the form of questions and answers. It radically fails to comply with Rule VIII of this court as to what the case should contain. We think all that was material in the return could have easily been condensed into 50 pages. The appellant's brief consists of 134 pages. It gives at length the pleadings, and about 80 pages are taken up with a statement of the facts or testimony. This is not "a succinct statement of so much of the record as is essential to the questions discussed," as required by Rule IX. A brief of 25 pages might have been made which would have included all that it was necessary to state therein.

We are not disposed to overlook such a flagrant disregard of the rules in respect to the printing of cases and briefs for this court. It would lead to great abuse to do so, as the costs of printing would be needlessly increased, and an unnecessary labor imposed upon the judges of this court in examining such uncalled for voluminous briefs and cases. In the taxation of costs the clerk will allow the appellant only fifty pages for the case and twenty-five pages for the brief, rejecting all the residue. See *Paine v. Trumbull*, 33 Wis., 164; *Marsh v. Sup'rs*, 42 Wis., 502.

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By the Court.—The judgment of the county court is reversed, and a new trial ordered.

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CRIMINAL LAW. *Errors in omitting to instruct.*

1. In a prosecution for rape, it was not error, against the accused, to omit to instruct the jury, in the general charge, that if they did not find him guilty of rape, they might find him guilty of assault with intent to commit that crime.
2. The court below did not caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime alleged; nor call their attention to the difficulty of defending against such an accusation; nor press upon their attention the rule that voluntary submission by the woman while she has power to resist, however reluctantly yielded, deprives the act of an essential element of rape; nor instruct them that proof of the good reputation of the accused as a peaceable and law-abiding citizen (there being such proof in the case) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be based. The court also refused instructions asked by the accused, containing some inaccuracies, but which aimed to state the foregoing propositions. *Held*, in view of the evidence at the trial, that such neglect to charge was error.

ERROR to the Circuit Court for *Outagamie* County.

J. V. Quarles, for plaintiff in error.

For the state, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General.

LYON, J. The plaintiff in error, *John Connors*, was tried, at the last March term of the circuit court for Racine county, upon an information charging that he had committed the crime of rape upon the person of one Caroline Ortell, on the 25th of February, 1879. The trial resulted in a verdict of

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guilty, and the court sentenced him to imprisonment in the state prison for the term of ten years.

The prosecutrix testified that in the evening of that day, at about half past eight o'clock, *Conners* came to the house where she was at work in the city of Racine, with a horse and cutter, and, under the false pretense that her brother was sick and dying, induced her to leave with him for her father's house, one or two miles distant, to see her brother. She also testified that before reaching her father's, *Conners* turned the horse from the road leading there, into another road; that he drove into a ditch, causing the cutter to upset, and dragged her a short distance to a telegraph pole, where, by force and against her will, he had carnal knowledge of her person, and that as soon as she was released she ran home crying; and told her father of the outrage which *Conners* had committed upon her. She also testified that she was under sixteen years of age, and that no man had ever before had sexual intercourse with her.

Conners was arrested for the offense during the same night. The next morning the person of the prosecutrix was examined by two physicians, by direction of the district attorney, and a short time afterwards she was examined by two other physicians, but at whose instance does not appear.

It is not denied that *Conners* stated to the prosecutrix and her mistress, when he went for the former, that her brother was sick; or that the horse went for a short distance on the wrong road and turned off the track towards the fence, near where the crime is alleged to have been committed; or that the prosecutrix walked to her father's house from that point. The testimony tends strongly to show that the prosecutrix did not reach her father's house for two hours after she left her place of service with *Conners*.

The plaintiff in error testifies that he went for the prosecutrix at her own request, and that she previously suggested to him to make the false pretense of her brother's sickness in

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order to obtain the consent of her mistress that she might go with him; that the horse he was driving was vicious and balky, and turned upon the wrong road and out of the track against his will; that the cutter did not upset, but the prosecutrix remained in it for some time while he was out of the cutter trying to induce the horse to go, and then, the weather being cold and they being only a short distance from her father's, she concluded to walk there, and did so; and that he did not ravish her or have sexual intercourse with her, or offer or propose to do anything of the kind.

The evidence tends very strongly to show that *Connors* and the prosecutrix must have been together at least an hour at the place where she claims to have been ravished. Snow or sleet was falling, the wind was quite high, and the weather was very cold. Witnesses who went to the place the next morning testified they saw the tracks of the cutter where it turned out of the road and passed over a snow-drift, but could discover no indications in the snow that a cutter had turned over there, or of a struggle at or near where the prosecutrix claims she was ravished. Her father testified that he saw indications that something had been dragged there, and that persons had lain there in the snow. No other witness so testifies. Some of the witnesses say the snow had drifted some during the night. There were several occupied houses in the vicinity of the place — one of them very near it.

It is a significant fact that none of the physicians who examined the prosecutrix were called by the state as witnesses. They were, however, all called by the defense, and all testified that they were unable to find a bruise upon the person of the prosecutrix, or any irritation of her sexual organs. Neither did they find any blood stains upon her clothing, or any evidence whatever indicating recent sexual intercourse, much less evidence indicating that she had been so recently ravished. Some of the physicians say, however, that it would have been possible, in their opinion, for a man of ordinary parts to have

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had connection with her. One of them, known to some members of this court to be a gentleman of great experience and eminence in his profession, testified that he was unable to insert his finger in her parts without inflicting pain.

The defense proposed to show by Dr. Martin that he had examined the plaintiff in error, and that he was a man of more than ordinary parts. An objection to the admission of the testimony was sustained by the court.

The prosecutrix testified that she was wearing tight or closed drawers at the time, and that *Conners* tore out a button-hole in getting them down. There is no pretense in the evidence that her clothing was otherwise torn or injured.

The foregoing statement of facts would gladly have been omitted, but the same is absolutely essential to an understanding of the significance of the instructions prayed on behalf of the plaintiff in error, but which the court refused to give.

At the close of the charge, counsel for the plaintiff in error excepted to it because the court failed to instruct the jury that, in case they did not find the accused guilty of rape, they might find him guilty of an assault with intent to commit that crime. Such an instruction would have been entirely correct, but it is not very apparent how the accused could have been prejudiced by the failure to give it. It seems probable that he might, in certain contingencies, have been better off without the instruction. Had the jury only found an assault with intent to ravish, they might, in the absence of the proposed instruction, have returned a verdict of not guilty. Not so had the instruction been given. A conviction for the felonious assault would necessarily have followed.

The learned circuit judge refused to give the following instructions prayed on behalf of the plaintiff in error:

"1. The charge made against the defendant is, in its nature, a most heinous one, and well calculated to create strong prejudice against the accused; and it has been well said by an

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eminent judge, Lord HALE, that rape is an accusation easily made, hard to be proven, and harder still to be defended against, though the accused be ever so innocent. So you, the jury, must carefully consider all the evidence in the case, and the law given you by the court, in making up your verdict. You must find on the part of the woman not merely a passive policy, or an equivocal submission to the defendant; such resistance will not do. You must find that the woman exercised the utmost resistance in her power, and submitted, if at all, with the utmost reluctance to the defendant. A mere half-way struggle is not enough; and unless you do find, beyond a reasonable doubt, that the woman did offer the utmost resistance in her power, and submitted to the defendant with the utmost reluctance, your verdict will be, not guilty.

"2. If the woman resist, but finally consent, no offense is committed.

"3. The evidence introduced by the defendant of good reputation is evidence to be considered by the jury in favor of the defendant."

The charge given by the learned circuit judge to the jury contains a correct statement of the law of the case, as far as it goes, but it does not contain the substance of the rejected instructions. It fails to caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime charged in the information, or to call their attention to the difficulty, growing out of the nature and usual incidents of the crime, of defending against an accusation of rape. It did not press upon their attention the principle or rule that voluntary submission by the woman, while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape. The jury were not expressly told that if the carnal knowledge was with the voluntary consent of the woman, no matter how tardily given, or how much force had been theretofore employed, it is no rape. And lastly, the jury were not instructed

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that proof of the good reputation of the accused as a peaceable and law-abiding citizen (and such proof was given on the trial) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be predicated.

The proposed instructions are not very accurately drawn, but they aim to state the above propositions, all of which are well established rules of law.

The evidence above stated showing, or tending to show, the length of time *Connors* and the prosecutrix were together, the absence of indications in the snow of a struggle, the absence of bruises upon her person or irritation of her sexual organs recently after the alleged rape, the conformation of those organs, the slight disarrangement of her clothing, and the previous good reputation of the accused, tend to cast a doubt upon the truth of the positive testimony of the prosecutrix that *Connors* ravished her. Because the evidence left room for such doubt, the propositions of law sought to be embodied in the rejected instructions should have been given, to aid the jury in solving the doubt, if any existed, to aid them in determining whether there was a reasonable doubt of the guilt of the accused. It was the duty of the judge to correct any inaccuracies in the instructions proposed, and to give them as corrected. *State v. Wilner*, 40 Wis., 304.

We are also inclined to think that the testimony of Dr. Martin should have been received.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a new trial. The warden of the state prison will surrender the plaintiff in error to the sheriff of Racine county, who will hold him in custody until he shall be discharged, or his custody changed by due course of law.

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THE STATE VS. BIERBACH and others.

When criminal action may be certified here on exceptions.

To give this court jurisdiction of a criminal action certified to it upon exceptions (under sec. 4720, R. S.), such exceptions must have been presented to the judge of the court below and allowed by him during the term of the trial. In other cases, the remedy is by writ of error to bring up the record, after judgment.

CERTIFIED on Exceptions from the Municipal Court of *Milwaukee County*.

On a motion by the state to dismiss the exceptions, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General.

TAYLOR, J. This case is certified to this court upon exceptions taken by the defendant in the court below. The record discloses that the exceptions were not presented to the judge and allowed by him until after the expiration of the term of court at which the trial was had. This court has no jurisdiction to pass upon such exceptions. The right of this court to pass upon exceptions taken and allowed by the court, when there is no final judgment and no writ of error is issued to the court below, is given by section 4720, R. S. 1878. That section provides that "any person who shall be convicted of an offense before the circuit court, being aggrieved by any opinion, direction or judgment of the court in any matter of law, may allege exceptions to such opinion, direction or judgment, which exceptions, being reduced to writing in a summary mode and presented to the court *at any time before the end of the term*, and if found conformable to the truth of the case, shall be allowed and signed by the judge," etc.

The statute then provides that upon allowing such exceptions the court shall stay proceedings, unless it shall clearly appear that such exceptions are frivolous, immaterial or in-

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tended for delay. The practice under this section is to certify such exceptions at once to this court for its consideration. The proceeding is intended to be a summary one, and it is therefore required that the exceptions must be allowed before the end of the term at which the trial is had. When exceptions are not allowed and signed until after the term, judgment must follow the conviction, and the exceptions then allowed are made a part of the record, as a bill of exceptions, under the provisions of section 4724; and in order to enable this court to review such exceptions settled after term and allowed as a bill of exceptions, the record containing such bill must be brought to this court by writ of error. It appearing that the exceptions were not allowed before the end of the term at which the trial was had, and there being no final judgment and writ of error in the case, the exceptions must be dismissed. *State v. Pooler*, 37 Wis., 305.

By the Court. — So ordered.

THE STATE VS. MILLER.

CRIMINAL LAW: EVIDENCE. (1) *Comparison of papers to prove handwriting.* (2) *Admissions.* (3) *Proof of defendant's guilt of different crime from that charged.*

1. The rule in this state is, that, for the purpose of determining whether a paper offered in evidence is in defendant's handwriting, the jury may compare it with other documents *already admitted in evidence upon other grounds*, and shown to be in his handwriting; but that such a paper cannot be put in evidence for the mere purpose of such a comparison.
2. On trial of an indictment, it appeared that public officers, while questioning defendant as to his participation in the crime charged, repeated orally to him the words of a letter supposed to have been written by him, containing threats of such crime; and that defendant, in their presence and at their request, wrote on another paper the same words. Said officers, while testifying at the trial to the admissions of defendant at such examination, produced such copy, and it was received in evidence and sub-

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mitted to the jury for comparison with the original letter. *Held*, that it formed no part of defendant's admissions, and, not being admissible for any other purpose than that of such comparison, it should not have been received for that purpose, under the foregoing rule.

3. Arson not being in general a crime of like nature and intent with forgery or larceny, in the trial of an indictment for arson, proof that defendant had been guilty of forgery and larceny is not admissible, unless accompanied by evidence that the latter crimes and the one charged had a common purpose, or that one was committed to conceal the others.

REPORTED by the Judge of the Municipal Court of *Milwaukee* County.

Miller was convicted upon an information in said court for arson; and, after denying a motion to set aside a verdict and grant a new trial, the judge of said court reported the cause to this court upon questions of law, which are stated in the opinion.

James Hickcox, for the defendant.

For the state, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General.

ORTON, J. It appears to us that the principle and correct rule by which the admissibility of the evidence received and involved in the two questions reported is to be determined, and the true grounds of their application to a given case, have been clearly established by previous decisions of this court, and it will therefore be profitless to review the great multiplicity of decisions of other courts which recognize the same rule, and differ only in its application.

The questions propounded by the learned judge who tried the case are: *First*. Did the court err in permitting the letter written by the defendant in the police station, after he was arrested, to be admitted in evidence and given to the jury? *Second*. Did the court err in admitting testimony to show that the defendant had been guilty of forgery and larceny?

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As to the first question, it was in proof that the defendant was being examined and questioned generally by the police officers concerning his participation in the crime charged, and a letter supposed to have been written by him, containing threats of arson, was orally and verbally repeated in his hearing, and he was requested to write and did write on another paper the same words, in the presence of such officers, and the original letter so repeated contained words of peculiar form, style and orthography, and the copy so made was in these respects a *fac simile* of the same; and such officers, as witnesses on the trial, produced such copy, while testifying to the admissions of the defendant in such examination, and it was received in evidence and submitted to the jury for the purpose of comparison with the original letter, and determining thereby the authenticity of the same.

The act of so copying the original letter could not, by the most liberal construction of language, be considered and treated as any part of the *oral* and *verbal* statement or admission of the defendant, elicited upon such examination. It was an independent act and fact, which had nothing to do with his oral statement or admission, which, to be evidence, must have been voluntary, and made understandingly, and repeated in the same language, if possible. But if language could be so liberally construed for the state, and so illiberally construed for the defendant, as to make such act of copying a part of the oral statement by being connected with it, even then it would not be the province or right of the prosecution to prove it on the ground that the *whole* of such statement must be given if any of it; but the defendant alone had the right to demand such testimony, if he chose to exercise it, on such ground. 1 Greenl. Ev., §§ 201, 202.

If such an act of copying a letter, at the dictation or request of a witness, can be treated and admitted in evidence as a *part* of his oral confessions, then such an act would be admissible if it constituted the *whole* of such confession; and a

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fact might thus be proved as a confession or admission which could not be proved in any other way, and any other proof of which would be incompetent.

It will not be contended that it would be proper to prove that the defendant *actually* wrote the copy, for the purpose of introducing it in evidence to convince the jury by comparison that he also wrote the original, unless such copy is already in evidence for some other purpose.

It must be held, therefore, that such copy was not properly in evidence as a writing or paper with which the original letter could be compared by the jury upon the question of its authorship. The true rule in such cases is: "The jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents *already in evidence before them*, and shown to be the genuine production of the person whose handwriting is in question." Roscoe's Crim. Ev., 5. This was the English rule until changed by statute of 28 Victoria, and is the rule adopted by this court, and will be, unless changed by our own legislature.

The rule as stated by this court is explicit, that such a comparison will not be allowed except with writings "clearly proved and already in the case, and before the jury for some other purpose." *Pierce v. Northey*, 14 Wis., 9; *Hazleton, Adm'r, v. The Union Bank of Columbus*, 32 Wis., 34.

The first question must therefore be answered in the affirmative.

As to the second question, there may have been other evidence than that which appears in the report, showing the intimate relation between the crimes of larceny and forgery, confessed or proved, and the crime of arson in the information, as to their *common* design, purpose and intent; for it is not certified that the report contains all of the evidence.

It is not perceived, however, from the evidence which is reported, how these crimes have any such relation to each other. The object of such testimony, when admissible, is not to prove

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the act, but the purpose and intent with which the act is done; and therefore other crimes of like purpose and intent may be proved, as being in such intimate relation with each other and the crime charged as to show a common purpose and intent in the commission of all of them, and a continuity of purpose instigating the whole series of like offenses.

This is a class of evidence introduced for the mere purpose of explaining the motive and intention of the defendant in doing the act charged as a crime. Roscoe's Crim. Ev., 92. There is not in this evidence any proof whatever that the arson was committed to conceal the former crimes, or to destroy the evidence of them, or that the three crimes, all of them, were committed to carry out any common design or intent to injure or ruin the witness Bruhns. The paramount purpose and design of larceny and forgery are *gain* and personal advantage, while those of arson are injury from malice; and if these motives are absent from these acts respectively, the acts may not constitute crimes; and therefore these different motives and purposes may not be confused or blended in dissimilar offenses without affecting their degree of criminality. Russ. on Cr., 146, 788, 1034.

It would require strong evidence to prove that crimes so dissimilar in purpose and intent were committed with a *common* purpose and intent, and therefore bore such relation to each other that proof of one would be proof of the intent of the others, and bring the case within the rule that offenses of like nature and intent may be given in evidence to convict of a subsequent crime, or to prove the intent of such crime, or as tending to prove such intent.

In *Benedict v. The State*, 14 Wis., 425, the same rule is laid down as to the exhibition of weapons and previous threats as affecting the question of intent in a future homicide, and as showing the disposition of the defendant in the commission of the act; and such evidence is allowed because of the relation between threats of this character and the crime of mur-

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der, in general purpose and intent; and it must, we think, be assumed that upon the trial of arson proof that the defendant *just previously* committed the crime of larceny is held by this court, in *Schaser v. The State*, 36 Wis., 430, to have been improper, as not relevant and pertinent, upon the ground that the two crimes had no relation with each other in purpose and design, so as to affect the question of intent in the latter.

We do not decide that it may not be shown, by testimony sufficiently strong, that even a previous larceny or forgery had the common purpose and design of a subsequent malicious burning, and bore such a relation to the arson, in this respect, that proof of the former might affect the question of intent in the commission of the latter crime; but such evidence is entirely wanting in this case, as reported, and may have been given on the trial. The answer to the second question must, therefore, be given *hypothetically* in the affirmative.

 CASPER VS. THE STATE.

CRIMINAL ACTIONS: APPEAL TO SUPREME COURT. (1) *Reversal for defect of evidence.* (2) *Presumption as to instructions.*

CRIMINAL LAW: CONSPIRACY TO DEFRAUD. (3) *Property of city in moneys paid to its treasurer.* (4) *Liability of officer for moneys officially received.* (5) *Separate trials of conspirators.* (6) *When judgment goes against one separately convicted.* (7) *Interchange of transcripts of record.*

1. Where the record shows evidence, upon trial of a criminal action, tending to support the verdict against the accused, and appearing to have satisfied the jury beyond reasonable doubt, and the court below refused a new trial, this court refuses to reverse the judgment on the ground of a want of evidence or a preponderance of evidence against the verdict.
2. Where the court below gave all correct instructions asked by the counsel of the accused, and no others, and these are not shown by the bill of exceptions, the presumption is that they were full and correct, and included an instruction that the jury should not convict the accused unless satis-

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fied of his guilt beyond a reasonable doubt; and failure of the judge to give separate instructions of his own is not error.

3. Under a statute (ch. 370 of 1876) which requires the clerk of a court to pay periodically, at fixed times, into the treasury of a city, unpaid witnesses' fees received by him, and makes the city, after receiving the moneys, merely liable to pay the witnesses upon their demand, the city has at least a *special property* in the money after it becomes payable into its treasury; and this will support an averment of property in the city in an information against the clerk and another person for conspiracy to cheat and defraud the city.
4. One who, as clerk of a court, has officially received a fine imposed by the court, cannot question the validity of the fine or his official duty in respect of it.
5. Separate trials may be had upon indictment or information for conspiracy; and under secs. 4630, 4635, R. S., where the venue is changed for some only of the defendants in such an indictment or information, separate trials must be had.
6. Where several persons are prosecuted together for a crime which one, or other limited number only, cannot commit (like conspiracy or riot), and are taken and may be brought to trial, and, on separate trials, verdicts go against a number who are not capable in law of committing the crime, judgment against those found guilty should be suspended until the number necessary to the crime are convicted; those already found guilty being meanwhile held in custody or under recognizance. Failing conviction of a sufficient number, those against whom verdicts have been found should be discharged. When verdicts are found against the number necessary to the crime, judgment should go against them.
7. In such a case, where the accused have been tried in different courts, transcripts of so much of the record as may be necessary to show the verdict in each case should be transmitted from one court to another.

ERROR to the Municipal Court of *Milwaukee* County.

In May, 1879, an information was filed in said court against *Charles Casper*, Peter Bellinghausen and Henry G. Phillips. The first count charges, in substance, that *Charles Casper* was clerk of said court from January 1, 1876, until January 7, 1878; that Peter Bellinghausen was assistant clerk of the same court from January 1, 1876, until January 1, 1879; that Henry G. Phillips was a clerk in the office of said clerk from January 1, 1876, until January 1, 1879; that at various times between July 3, 1876, and January 5, 1878, said *Casper*, as

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such clerk, received divers sums of money, amounting in all to \$115.51, being the fees of witnesses in certain criminal cases tried in said court; that said sums of money have never been called for by, or paid to, the witnesses entitled to receive them, or paid over to the city treasurer of the city of Milwaukee; that during the whole period last above named, there was kept in the office of such clerk and used by said *Casper*, Bellinghausen and Phillips, officially in their respective employments, a certain book called a "cash book," in which were and ought to have been entered, from day to day, the receipts and disbursements, by them or either of them, of money officially received or disbursed, including the several sums above mentioned; that during said time there was so kept and used a certain other book and public record of said court, called the book of "witnesses in state cases," in which were and ought to have been entered, from day to day, the names of all witnesses in criminal cases tried in said court, whose fees were paid to the clerk of said court, and opposite the name of every such witness the amount of such fees due him or her, and the fact whether and when said fees had been paid to said witness; that on the 7th of January, 1878, one Julius Meiswinkel became successor to said *Casper* for the term of three years from the first Monday in January, 1878, and took possession of the office and of the books and records thereof, including the two books above mentioned, which said *Casper* turned over to him and left in said office; that *Casper* did not then or at any time turn over or pay to said Meiswinkel the said sums of money or any part thereof; and that on the 1st of February, 1878, said *Casper*, Bellinghausen and Phillips, wickedly intending and devising to disregard the provisions of ch. 370, Laws of 1876, etc., did fraudulently and unlawfully conspire, combine, etc., by carrying said cash book away from said office, and secreting it, and by altering and making false entries in said book of "witnesses in state cases," so as falsely to make it appear that all said sums of money had been paid

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to the several witnesses, to cheat and defraud said city of Milwaukee of said sums of money, the money of said city.

The second count charges that on the 30th of April, 1878, in pursuance of said conspiracy, etc., Casper unlawfully carried away said cash book from said office, Bellinghausen made false entries in the book of "witnesses in state cases" so as to make it appear that all said fees between July 3, 1876, and February 28, 1877, had been paid, and Phillips made like false entries in the same book in respect to fees of witnesses between February 28 and September 28, 1877; and that on said 30th of April, 1878, defendants, in further pursuance of such conspiracy, falsely wrote upon the subpoenas on file in said court, amongst the records and files of criminal causes tried therein between July 3, 1876, and January 5, 1878, words and characters denoting that all witnesses in said causes, whose fees had been received by the clerk of said court, had been paid their fees by said clerk.

The third count charges the defendants, in a somewhat different form, with devising and executing the same conspiracy to cheat and defraud the city of Milwaukee of \$115.51; the time laid being April 30, 1878.

The fourth count alleges that the same defendants, devising and intending to defraud the county of Milwaukee of the sum of \$100, did, on the 2d of October, 1877, conspire, etc., by omitting to complete the record in a certain criminal cause in said court (stating the title thereof), and by abstracting from the files of said court and carrying away and secreting the judgment roll in said cause, unlawfully to cheat and defraud said county of the sum of \$100, which had been paid to Casper as such clerk, August 14, 1877, for a fine imposed upon one of the defendants in said cause (naming her); and that these defendants, on said 2d of October, in pursuance of such conspiracy, etc., abstracted from the files of the court said judgment roll and secreted the same, and omitted to complete said record, or to report or pay over said \$100 to the city treasurer of Mil-

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waukee as required by law, and embezzled and converted the same to their own use.

The defendants, having been duly arraigned, severally pleaded not guilty. On the 20th of May, 1878, Bellinghausen and Phillips having made affidavit of the prejudice of the judge of said municipal court, the cause as to them was removed for trial to the circuit court for Milwaukee county.

On the trial of *Casper* in the municipal court, on the day last named, the court gave the jury eight written instructions requested by the defendant; but refused to give the ninth instruction so requested, which was as follows: "You must be satisfied beyond a reasonable doubt that the witnesses did not receive their fees in the several cases in which they had testified, and authorized no one to receive them, and that no one received them without their authority, and that they were appropriated by the defendant under and by virtue of a conspiracy. If the defendant was obliged by law to pay over the uncalled for witness-fees to the city treasurer, and has neglected to do so, and has marked the same as paid, he may have been guilty of not paying the fees to the several witnesses entitled thereto, but he cannot be guilty of defrauding the city out of the money, because the city treasurer would not be liable to pay any money to the several witnesses entitled to the same, except upon a certificate of the clerk, and the clerk can give no such certificate, for they are marked paid."

After a verdict of guilty, the defendant moved in arrest of judgment, for a want of evidence to support the verdict, and because, the information being for a *conspiracy*, only one of the defendants had been convicted. The motion was denied, as was also one for a new trial; and judgment was rendered on the verdict, to reverse which the defendant took his writ of error.

James Hickcox, for plaintiff in error, argued, among other things, 1. That there was no proof of *concert* to support the verdict. 2. That the evidence under the fourth count was in-

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sufficient, because no *judgment* of the municipal court had been shown, imposing the fine there mentioned, and there was no fine, and no money to which the county was entitled, in the absence of such a judgment. *Lincoln v. Cross*, 11 Wis., 94; *Wheeler v. Scott*, 3 id., 362; 36 id., 29, 409, 518; 40 id., 23, 545. 3. That the city of Milwaukee was not defrauded by the nonpayment to its treasurer of the fees mentioned in the first three counts, (1) Because the city treasurer was the mere custodian of the money until demanded by the witnesses. (2) Because the money was payable to witnesses only on the certificate of the clerk of the court, and the clerk could give no certificate as to witness fees which were marked "paid." 4. That there could not be separate trials for conspiracy (*Comm. v. Manson*, 2 Ashm., 31; 1 Bish. Crim. Pro., §1022); and that a conspiracy by two or more persons cannot be established unless two or more persons are found guilty. Whart. Cr. Law, §§ 2339, 2335; *U. S. v. Cole*, 5 McLean, 513, 601; *Reg. v. Thompson*, 71 E. C. L., 832, 842; *Horseman v. Reg.*, 16 Up. Can. Q. B., 543; *Reg. v. Barry*, 4 F. & F., 389; *State v. Trammell*, 2 Ired., 379; 9 Gray, 127; *Comm. v. Judd*, 2 Mass., 329. 5. That although the judge of the court below gave instructions asked for by the accused, yet, as he gave no other instructions, he did not "charge the jury" as required by secs. 2853, 4701, R. S.

For the state, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General. They contended, among other things, 1. That on a charge of conspiracy participation of the persons accused at the inception of the design need not be shown, but subsequent participation is sufficient; and that their concurrence or combination need not be proved *directly*, but any coherence of action on a material point, or collocation of independent but coöperative acts by persons closely associated with each other, is sufficient to enable the jury to find the combination. *Comm. v. McClean*, 2 Pars. (Pa.), 368-9; *Street v. The State*, 43

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Miss., 2; *State v. Sterling*, 34 Iowa, 443; *State v. Nash*, 7 id., 347; *Rex v. Parsons*, W. Black., 392; *Reg. v. Murphey*, 8 C. & P., 297; *Rex v. Cope*, 1 Strange, 144; *Comm. v. Warren*, 6 Mass., 74; *Comm. v. Crowninshield*, 10 Pick., 497; *State v. Mayberry*, 48 Me., 218; *State v. Wilson*, 30 Conn., 500; *State v. Grady*, 34 id., 118; *Kelley v. People*, 55 N. Y., 576; *People v. Mather*, 4 Wend., 229; *State v. Ross*, 29 Mo., 32; *Green v. The State*, 13 id., 382; *Tompkins v. The State*, 17 Ga., 356; *People v. Brotherton*, 43 Cal., 530; *U. S. v. Cole*, 5 McLean, 513. 2. That there may be separate trials upon an information against several persons for conspiracy. *State v. Buchanan*, 5 Harris & J., 500; *Regina v. Kenrick*, 48 E. C. L., 53-4, and cases there cited; *Rex v. Kinnereley and Moore*, 1 Strange, 193; *King v. Cooke*, 11 E. C. L., 408; *Rex v. Nicolls*, 2 Strange, 1227; *King v. Inhabitants of Oxford*, 13 East (notes), 411; *People v. Olcott*, 2 Johns. Cas., 311; R. S., sec. 4685. They further contended, on the authority of some of the cases last cited, that upon the conviction of one conspirator, judgment might go against him, at least where the others had not been acquitted.

RYAN, C. J. There certainly was evidence, upon the trial of the plaintiff in error, tending to support the verdict, and appearing to have satisfied the jury beyond a reasonable doubt. There is no such want or preponderance of evidence against the finding as would warrant this court to set aside the verdict, or to hold that the learned judge of the court below, who heard the evidence and could judge of its credibility better than this court, erred in overruling the motion for a new trial. More it would hardly be proper to say here, as the codefendants of the plaintiff in error are yet to be tried.

The bill of exceptions does not contain the charge of the court below, and the presumption is that the learned judge before whom the case was tried gave correct instructions to the jury, as was his duty, on all questions of law involved in

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the issue. *Brabbitts v. Railway Co.*, 38 Wis., 289. The presumption is the stronger in this case because it appears that the charge consisted wholly of instructions drawn by the counsel for the plaintiff in error. The jury should have been told, and the presumption is that they were told, that they could not convict the plaintiff in error unless satisfied of his guilt beyond a reasonable doubt. Therefore is it said that the evidence appears to have satisfied the jury beyond a reasonable doubt.

It appears that all the instructions prayed for the plaintiff in error were given to the jury, except one erroneous proposition presently noticed. It is, however, assigned for error, that the learned judge of the court below failed in his duty to instruct the jury, because he gave no separate instructions of his own. As already seen, the presumption is that the instructions given were full and correct; and when counsel sees fit to draw and submit the entire charge applicable to a case, and it is adopted and given by the court, it is not true in fact that the court fails to charge the jury. Instructions prayed, before given, are the instructions of counsel; when given, are the charge of the court.

The statute requires the clerk of the municipal court to pay periodically, at fixed times, into the treasury of the city, unpaid witnesses' fees received by him. After these fees come into the treasury of the city, they are payable by the city to the witnesses to whom they are primarily due, the city becoming their debtor for the amount. If not reclaimed by the witnesses, the fees remain the money of the city. In the meanwhile the city, from the time they are payable to its treasury, has, to say the least, a special property in them, and could, doubtless, maintain an action against the clerk for them. As against the clerk, therefore, the city might be held to have the general property in them. But a special property is sufficient to support the averment of the information of property in the city. 2 Archbold, 1153-1162.

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The instruction prayed by the plaintiff in error, which was not given, was in conflict with this view, and was therefore properly refused.

The plaintiff in error, as clerk of the municipal court, appears to have officially received the fine mentioned in the fourth count of the information, as a fine imposed by the court, and he cannot now be heard to question the validity of the fine or his official duty in respect of it. *Bullwinkel v. Guttenberg*, 17 Wis., 583; *Cairns v. O'Bleness*, 40 Wis., 469.

Although the practice may work inconvenience, and even difficulty, separate trials may be had upon indictment or information for conspiracy. *Thodie's Case*, 1 Ventris, 234; *S. C.*, 3 Keb., 111, 117; *Rex v. Kinnersley*, 1 Strange, 193; *Rex v. Nicolls*, 2 Strange, 1227; *S. C.*, 13 East, 412; *Rex v. Scott*, 3 Burr., 1262; *The King v. Cooke*, 5 Barn. & Cres., 538; *The Queen v. Kenrick*, 5 Adol. & Ellis, 49; *Reg. v. Ahearne*, 6 Cox C. C., 6; *People v. Olcott*, 2 Johns. Cas., 301; *State v. Buchanan*, 5 Harris & J., 317, 500. The only case referred to by counsel, or found, which holds otherwise, is *Commonwealth v. Manson*, 2 Ashmead, 31. The opinion in that case cites no authority against separate trials, and, however respectable, cannot overcome the uniform rule of decision for some two hundred years.

Informations for conspiracy are therefore within sections 4680 and 4685, R. S. The latter section is an anomaly. *Rupp v. Swinesford*, 40 Wis., 28. But courts must administer the statute as they find it, and when the venue is changed for some only of the defendants in indictment or information for conspiracy, separate trials must be had. The plaintiff in error was, therefore, properly tried alone in the municipal court.

Several of the English cases cited *supra* hold that where one only is found guilty of conspiracy, his codefendants not being tried, judgment should go against him. When a prisoner is alone indicted for a conspiracy with others unknown, or when he is indicted with others who cannot be taken or

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brought to trial, there appears to be no valid objection to that practice; for the verdict against him is that he was guilty with others who cannot be brought to trial, and there is no presumption in his favor of their innocence. But where several are prosecuted together, taken, and may be brought to trial, for conspiracy, and, their trial being severed, one only has been tried and found guilty, there is manifest impropriety in proceeding to judgment against him before the trial of his codefendants. The verdict against him would raise no presumption against them, and their acquittal would be inconsistent with his conviction, and should operate in law to acquit him also. Judgment against him, in such case, would not only be a cruel injustice, but an absurdity, which the law ought not to sanction; for one only cannot be guilty of conspiracy, and judgment against one, upon acquittal of those charged with him, would be not only a wrong to the person, but a blunder in law.

If this judgment were now to be affirmed, and the codefendants of the plaintiff in error should hereafter be acquitted, both the court below and this court would be apparently powerless to relieve him against the wrong of the judgment. He would apparently have no relief except by pardon, which is always discretionary. Such an administration of the criminal law would be essentially dangerous, and inconsistent with the conclusive presumption of verity of judgments. This court adopts a rule more just and humane in itself, and more in accord with the principles underlying all judicial administration. When several are prosecuted together for crime, which one, or other limited number only, cannot commit, like conspiracy or riot, and are taken and may be brought to trial, and on separate trials verdicts go against a number incapable in law of committing the crime, judgment against those found guilty should be suspended until the number necessary to the crime are convicted. Failing that, those against whom verdicts have been found should be discharged. When verdicts

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are found against the number necessary to the crime, then judgment should go against them. If they have been tried in different courts, transcripts of so much of the record as may be necessary to show the verdict in the case of each defendant should be transmitted from one court to the other.

On this ground the judgment here must be reversed as premature; but the verdict will stand pending the prosecution of the other defendants. In the meantime the plaintiff in error should be held in custody, or under recognizance from term to term of the court below, to receive judgment on the verdict.

By the Court. — The judgment is reversed, and the record remanded to the court below for further proceedings in accordance with this opinion.

FOWLE VS. THE STATE.CRIMINAL LAW. *Evidence in larceny.*

1. On trial of an information for stealing lambs and sheep, the owner testified that on a certain morning he missed from his yard animals of the number and character described in the information; and that he had driven them into his yard the night before, and during the night they were taken away. *Held*, that upon this evidence (in the absence of any tending to show consent), the jury might find that the property was taken without the owner's consent.
2. There was further evidence that property like that described in the foregoing testimony was found in defendant's possession a few hours after the taking; that defendant had been in the vicinity of the owner's place about the time of the taking; and that he told persons to whom he offered to sell the property, that he bought it at public auction in a certain place; and persons living in the vicinity of that place testified that there had been no auction there. No evidence was offered by defendant to account for his possession of the property. *Held*, that the evidence was sufficient to sustain a conviction.

ERROR to the Municipal Court of *Milwaukee* County.
Information for larceny. The court refused to instruct the
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jury, at defendant's request, to return a verdict in his favor. After a verdict of guilty, a motion in arrest of judgment, on the ground that the verdict was not supported by the evidence, was also denied, and judgment rendered against defendant, which is here sought to be reversed.

James Hickcox, for plaintiff in error.

For the state, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General. They contended, 1. That a motion in arrest of judgment does not reach defects in the evidence, but only matters of strict record. 1 Bishop Cr. Proc., 1108, citing 4 Bin., 2287; 1 Ld. Raym., 231; 1 Salk., 77, 315; 1 Sid., 65; Com. Dig., "Indictment," 91, 21. 2. That the evidence here was sufficient.

COLE, J. In view of the evidence it was surely not error for the municipal court to refuse to direct the jury to acquit the defendant. He was charged in the information with feloniously stealing and carrying away six lambs and a sheep, on the 27th day of September, of the value, etc., property of William McKay. It is said that there was no evidence given on the trial from which the jury would be warranted in finding that the property was ever stolen. The owner, McKay, testified that he missed from his yard, on the morning of September 28, 1877, six lambs and a wether, of the description given by him. He was sure that he had driven them into his yard the night before, and during the night they were taken away. It seems to us that this was sufficient proof of nonconsent on the part of the owner to the taking and carrying away of the property.

The only reasonable inference that could be drawn from such testimony is, that the taking and carrying away was against the will or without the consent of the owner. In 2 Archbold's Crim. Pr. and Pl., p. 1196, cited by the learned counsel for the defendant, it is said: "It is, therefore, a very usual way of

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proving a larceny, to call the prosecutor, or other person in whose possession the goods were at the time they were stolen, and prove when he last saw them in his possession, and when he missed them; then to call some person who can prove that they were in the possession of the prisoner very shortly after they were stolen." This is precisely what was done in this case. The owner proved his possession and when he missed the property. If he was to be believed, it was actually taken from his yard in the night time, under circumstances which would make the taking larceny. Property answering the description of that taken was found in the possession of the defendant (who had been in the vicinity where the theft was committed) on the morning of the 28th, in Milwaukee. From this evidence the jury might well have found that a larceny was committed, and that the defendant was the guilty party. It is noticeable that the defendant did not attempt to account for his possession of the property, or introduce any evidence calculated to rebut the presumption of larceny which would fairly arise from the facts proven. It is true, witnesses to whom he had offered to sell the chattels testified that the defendant said he bought the lambs and wether at public auction. But persons living in the vicinity where he said the auction had been held, testified that there had been no public auction there.

It is further objected that there was no sufficient proof produced to identify the property in the possession of and sold by the defendant with the property alleged to have been stolen. The owner described the lambs taken from his yard as being a cross between Leicester and cotswold — long-wooled sheep; that the lambs came in May; that the wether was a short-wooled, between Leicester and merino; and that the tails of all were trimmed close. This happened precisely to correspond with the description of the property the defendant sold, both as respects the kind and number of lambs and sheep. It seems to us that the evidence as to the identity of the chattels

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was ample to carry that question to the jury. The learned municipal judge charged that the jury must be satisfied beyond a reasonable doubt as to the identity of the property missed by McKay with that found in the possession of and sold by the defendant. Indeed, all questions of fact seem to have been fairly submitted upon a charge to which no exceptions were taken. We think that the verdict is fully warranted by the evidence, and that the judgment of the municipal court must be affirmed.

By the Court. — Judgment affirmed.

THE STATE VS. ALLISON.

CRIMINAL LAW. *When case may be reported from municipal court.*

The statutes of this state do not authorize the judge of the municipal court of Milwaukee county to report a case to this court for the determination of questions of law arising therein, where the defendant has been prosecuted and tried on complaint, as in cases before justices of the peace, without information or indictment.

REPORTED by the Judge of the Municipal Court of Milwaukee County.

F. C. Winkler, for the defendant.

For the state, there was a brief by the *Attorney General*, and oral argument by *H. W. Chynoweth*, Assistant Attorney General.

LYON, J. A complaint was made to the municipal court of Milwaukee county, against the defendant, charging him with assault and battery, and a trial was had in that court, which resulted in a verdict of guilty. The municipal judge thereupon reported the case for the opinion of this court on certain questions of law involved therein.

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We are to determine whether the statutes authorize the municipal judge to report a case to this court where the defendant had been prosecuted and tried on complaint (as in cases before justices of the peace), without information or indictment.

The authority to report a case to this court is given, by the general statute on that subject, to the circuit judge alone, and is confined to cases tried in the circuit court. R. S., sec. 4721.

Section 2500, as amended by section 2, ch. 256, Laws of 1879, which relates to the municipal court of Milwaukee county, provides that "the general provisions of law which may at any time be in force relative to circuit courts, and actions and proceedings therein, in cases of crimes and misdemeanors, shall relate also to said municipal court, *unless inapplicable*." The authority to report this case, if it exists, must be found in the above provision.

The statute confers upon the municipal court of Milwaukee county a twofold jurisdiction: *First*, a concurrent jurisdiction with the circuit court in all cases of crimes and misdemeanors arising in that county, and exclusive appellate jurisdiction of all crimes and misdemeanors tried before justices of the peace therein. Examinations, recognizances and commitments for trial in criminal cases arising in the towns of that county and not triable before justices of the peace, are returnable to the municipal, instead of the circuit court. Section 1, ch. 256, Laws of 1879. All this is circuit court jurisdiction proper. *Second*. By chapter 256, *supra*, read in connection with the procedure act of 1853, mentioned in section 3, such municipal court has exclusive jurisdiction of prosecutions for all offenses committed in the city of Milwaukee, otherwise cognizable by justices of the peace, under the general statutes on that subject (R. S., sec. 4739), and for violations of ordinances, rules and regulations of that city. We have here no concern with prosecutions for the violation of ordinances; but the criminal

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jurisdiction thus conferred by the statute is the jurisdiction of a justice of the peace, and nothing more.

This case belongs to the latter class. In its inception and progress to conviction no peculiar circuit court powers were exercised, but the prosecution was instituted as it would have been had the complaint been made to a justice of the peace; and to a considerable extent the procedure in the municipal court was controlled by the provisions of the statute giving jurisdiction to justices of the peace to hear, try and determine such prosecutions. For example, it was necessary to go to that act to ascertain whether the defendant might lawfully be prosecuted summarily; that is, without formal information. See *Jenkins v. Morning*, 38 Wis., 197; *Mathie v. McIntosh*, 40 Wis., 120.

Moreover, section 4 of the act of 1879, amendatory of section 2511, R. S., allows cases of the second class above mentioned, in certain contingencies, to be tried before any justice of the peace of Milwaukee county who may be designated for that purpose by the municipal judge; and such trials may be so had when a regular term of the municipal court, presided over by the judge thereof, is in actual session. This fact illustrates the broad distinction made by the statute between the two classes of cases.

Keeping in mind the distinction between the two classes of cases over which the municipal court has jurisdiction, we cannot think that the legislature intended to place the latter class in all respects on the same footing as the former. We do not think that the act of 1879 contemplates that the authority given by statute to the circuit court to report a case to this court should be extended so as to confer that authority upon the municipal judge, or the justice of the peace sitting for him, in cases of summary conviction—in which cases the court only exercises the functions of a justice's court. In other words, we think section 2500, R. S., as amended, is not applicable to such a case, and hence not within the provision of section 2 of the act of 1879 above quoted.

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Had the legislature intended to give to justices of the peace, or to courts exercising the ordinary jurisdiction of justices of the peace, the power to report cases of summary convictions for offenses, and to impose upon this court the onerous duty of determining all questions of law which might be presented in such reports, it is fair to presume that the statute would have expressed such intention directly and unequivocally. A doubtful inference is not sufficient to establish a change in the law so important and far-reaching.

It must be held, therefore, that the statute confers no authority upon the municipal judge to report this case to this court, and hence that we have no jurisdiction to determine on such report the questions of law submitted therein.

Our decision goes entirely upon the construction of the statutes, and we purposely avoid expressing or intimating an opinion upon any constitutional question which may be raised upon those statutes, or which would arise were the legislature to enact that the municipal judge might report a case of summary conviction to this court.

It follows that this court cannot entertain the report, or make any order in the case, except to direct the clerk to remit to the court below the record of that court sent here with the report. *State v. Parish*, 42 Wis., 625.

By the Court. — So ordered.

KLAUBER and another vs. BIGGERSTAFF, Garnishee.

BANKS: CONTRACTS. (1) "*Currency*" defined. (2, 3) *Certificates of deposit, when negotiable.*

1. The word "*currency*," in a certificate of deposit, means *money*, including bank notes which, though not an absolute legal tender, are issued for circulation by authority of law, and are in actual and general circulation (at the *locus in quo*) at par with coin.

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2. A certificate of deposit promising payment to order of a certain number of dollars "in currency" is negotiable. [*Ford v. Mitchell*, 15 Wis., 805; *Platt v. Bank*, 17 id., 223; and *Lindsey v. McClelland*, 18 id., 481, explained and criticised.]
3. Ch. 5, Laws of 1862, is also construed as declaring negotiable all notes or certificates of deposit payable in currency.

APPEAL from the Circuit Court for *Dane* County.

In an action against one Slater and one Ball, plaintiffs, on the 7th of December, 1878, garnished the State Bank of Madison, Wis., as being indebted to Slater or having in its possession personal property belonging to him. The garnishee denied that it was liable, unless it were by reason of having issued to Slater a certificate of deposit as follows: "\$1000, Madison, Wis., Nov. 19, 1878. D. S. Slater, Esq., has deposited in the State Bank one thousand dollars, payable to himself in currency on the return of this certificate. [Signed by the cashier.]" It further answered that it was advised and believed that said instrument was a negotiable security; and that *Arthur Biggerstaff*, residing in Edina, Mo., claimed of said State Bank the indebtedness represented by such certificate of deposit; and it prayed that said *Biggerstaff* might be interpleaded in said action, and that the State Bank, on depositing with the clerk of the court the \$1000 due on the certificate, might be discharged from liability either to plaintiff or to *Biggerstaff*. Accordingly, by order of the court, *Biggerstaff* was substituted for the State Bank as defendant; and he answered that he was the lawful owner and holder of said certificate of deposit; that on the 5th of December, 1878, he purchased and took an indorsement thereof from Slater, in good faith, for a valuable consideration, and before any dishonor thereof; that under the laws of Wisconsin it was negotiable, and neither it nor the money due thereon was subject to the garnishment proceedings; and that the words "in currency," used in said certificate, signified, and were used to signify, money.

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On trial of the issue in garnishment, the circuit court found as facts, among other things, that the \$1000 deposited by Slater in the State Bank was in currency; that Slater continued to own the certificate until December 21, 1878, when he sold and indorsed it to *Biggerstaff*; and that plaintiffs had recovered in the principal action against Slater and Ball. As matter of law, the court held that the certificate was not negotiable, and the fund was liable to garnishment. Judgment was accordingly rendered against the garnishee for the amount of the judgment in the principal action, and the costs of the garnishee proceedings (the aggregate of which was less than \$1000); and the clerk was ordered therein to pay plaintiffs the amount out of the fund in his hands.

From this judgment the garnishee appealed.

F. J. Lamb, for the appellant, contended, among other things, that the statute passed after the former decisions of this court in regard to certificates of deposit payable in currency or current funds, viz., ch. 5 of 1868, was intended to declare instruments of this character negotiable, in accordance with the suggestion made to the legislature by this court in *Platt v. Sauk Co. Bank*, 17 Wis., 226. Certificates of deposit payable in money were already negotiable (*Lindsey v. McClelland*, 18 Wis., 484, and cases there cited); and the change of the statute must have been made for the purpose here suggested, or it was wholly nugatory. A statute ought to be so construed that, if possible, no sentence, clause or word shall be superfluous, void or insignificant. *Harrington v. Smith*, 28 Wis., 67, and authorities there cited. In this connection counsel suggested that the word "money" is often used, and was probably used in the statute, as including bank notes current in ordinary payments, as cash. Burr. Law Dic. and App. Encyc., *sub verbo*; *Mann v. Mann*, 1 Johns. Ch., 231, 236-7. Counsel further stated that sec. 1, ch. 60, R. S. 1858 (sec. 1, ch. 44, R. S. 1849), was taken bodily from the R. S. of New York of 1829 (sec. 1, tit. 2, ch. 4, part 2—vol. 1, p. 768), and was identi-

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cal with laws in force in New York in 1812 and 1821 (see brief of counsel in *Keith v. Jones*, 9 Johns., 120); and that, by decisions made in New York in the years last mentioned, it was held that promissory notes payable in "York state bills," or in "bank notes current in the city of New York," were negotiable. *Keith v. Jones*, *supra*; *Judah v. Harris*, 19 Johns., 144. See also *Pardee v. Fish*, 60 N. Y., 265; *Frank v. Wesels*, 64 id., 155; *Ehle v. Chittenango Bank*, 24 id., 548. These facts seem not to have been brought to the attention of this court at the time of its former decisions upon the negotiability of paper payable in currency.

For the respondents, there was a brief by *Gregory & Pinney*, and oral argument by *J. C. Gregory*. They argued, among other things, 1. That the rule, with few exceptions, has always been, that bills of exchange or certificates of deposit payable in "currency" or in "current funds" are not negotiable (*Parsons on N. & B.*, 45-7; *Edw. on Bills*, 134-5); and that this court has so decided in three several cases. The ground of those decisions was, that such paper is not payable in money. *Ford v. Mitchell*, 15 Wis., 305 (1862); *Platt v. Sauk Co. Bank*, 17 id., 223 (1863); *Lindsey v. McClelland*, 18 id., 481 (1864). 2. That ch. 5, Laws of 1868, declares negotiable only such notes, etc., as are payable in money. Probably this amendatory act of 1868 was aimed at *O'Neill v. Bradford*, 1 Pin., 390, where it was held that a "certificate of deposit was neither a bill of exchange nor a promissory note, and was not negotiable." Counsel further contended that the word "as" in the phrase "any sum of money as therein mentioned," was entirely insignificant; that the bill as originally introduced read, "any sum of money in coin or currency as therein mentioned;" that it was amended by striking out the words "in coin or currency;" and that the failure to strike out the word "as" was a mere oversight.

RYAN, C. J. The controlling question in this case is, whether

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the certificate of deposit stated in the proceedings is negotiable.

"A promissory note may be defined to be a written engagement by one person to pay another person therein named, absolutely and unconditionally, a certain sum of money at a time specified therein." Story on Prom. Notes, § 1. The ordinary form of a certificate of deposit of money falls precisely within the definition, and it seems strange that there ever was a doubt that it was in law a negotiable promissory note. *O'Neill v. Bradford*, 1 Pin., 390, and cases there cited. Such doubt, however, may now be considered at rest. *Kilgore v. Bulkley*, 14 Conn., 362; *Bank v. Merrill*, 2 Hill, 295; *Miller v. Austen*, 13 How., 218.

The learned counsel for the respondents concedes this; but he takes the position that the certificate of deposit in question is not a promissory note, because it is not payable in money. It is for so many dollars, payable in currency; and the learned counsel contends that the word *currency* does not express or imply money. It must be conceded that the cases in this court (*Ford v. Mitchell*, 15 Wis., 305; *Platt v. Bank*, 17 Wis., 223; and *Lindsey v. McClelland*, 18 Wis., 481), which he cites in support of his position, lend strong sanction to it.

These cases were decided, respectively, in 1862, 1863, and 1864, when the paper money, circulating in the state *de facto*, was of a very heterogeneous character. How much influence this fact had on those decisions, or on similar decisions elsewhere, it is impossible to say. It is, perhaps, not altogether an uncommon infirmity of judicial rules, that they are made in view of exceptional conditions of things presently existing. Passing evils or exigencies should have little weight in general rules of decision. Judicial rules ought properly to be based upon the general condition of society, and to be broad enough to meet occasional derangements incident to it.

In *Ford v. Mitchell* the certificate of deposit was payable in "currency," and protested for nonpayment. It had been

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received by the plaintiff upon a sale made by him to the defendant. A majority of the court concurred in the judgment, on the ground that the plaintiff might recover for the original consideration. So DIXON, C. J., who delivered the principal opinion, holds. But his opinion also holds that the defendant was liable as a guarantor by force of his indorsement of paper not negotiable. PAINE and COLE, JJ., decline to express any opinion on the latter point.

In *Platt v. Bank* the certificate of deposit was payable in "current funds." The chief justice delivered the opinion of the court, stating that such paper had been held not to be negotiable in *Ford v. Mitchell*, and that the cases were not distinguishable; adding that the rule is sustained by an almost unbroken current of authority. In this the learned chief justice was not, perhaps, quite as accurate as usual; and he was manifestly mistaken in his statement of *Ford v. Mitchell*. Though the decision appears to have been unanimous, it plainly proceeded somewhat upon a mistake.

In *Lindsey v. McClelland* the certificate of deposit was payable in "current funds," and was protested for nonpayment. The opinion of the court is delivered by Mr. Justice COLE, who not unnaturally falls again into the mistake that the court (in *Ford v. Mitchell*) had held that the words "payable in current funds" rendered the instrument not negotiable. *Platt v. Bank* is not cited. The opinion states that the certificate "is not payable in money, or what the court is bound to consider equivalent to money." The opinion then proceeds to show that if the certificate had been negotiable, it had been protested so as to hold the defendant as indorser; and further that it had not been received in payment, implying that the plaintiff might recover on the original consideration.

It is thus seen that *Platt v. Bank* is perhaps the only case in this court positively adjudging that an instrument payable in *current funds* is not negotiable, and that there is no case so holding of an instrument payable in *currency*. *Prima facie*

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there might seem to be little difference in the two terms; but the opinion of the court in *Platt v. Bank* gives a construction to the term *current funds*, which the term *currency* could not properly bear. "It was suggested at the bar that the certificates might be deemed payable in the treasury notes of the United States, and therefore negotiable, since the law of congress declares such notes to be equivalent to gold and silver coin in payment and tender for debts. But the words 'current funds' cannot be so construed. They were undoubtedly intended to include all funds bankable in this state, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of this state passing as currency would have discharged the obligation."

With such a construction of the term used, the instrument was not payable in money, and therefore not negotiable. So are nearly all of the authorities on paper positively payable in specific kinds of bank-notes, or in bank-notes generally, because not necessarily money.

The true and only test in this respect of the question whether an instrument be negotiable under the statute of Anne, is always whether it is payable in money.

Money is a generic and comprehensive term. It is not a synonym of coin. It includes coin, but is not confined to it. It includes whatever is lawfully and actually current in buying and selling, of the value and as the equivalent of coin. By universal consent, under the sanction of all courts everywhere, or almost everywhere, bank-notes lawfully issued, actually current at par in lieu of coin, are money. The common term, paper money, is in a legal sense quite as accurate as the term, coined money.

The question whether bank-notes are money or only *choses in action*, was directly involved in *Miller v. Race*, 1 Burr., 452.

"The whole fallacy of the argument," says Lord MANSFIELD, in delivering the unanimous opinion of the court,

"turns upon comparing bank-notes to what they do not resemble and what they ought not to be compared to, viz., to goods, or to securities, or documents for debts.

"Now they are not goods, not securities, nor documents for debts, nor are so esteemed; but are treated as *money*, as *cash*, in the ordinary course and transaction of business, by the general consent of mankind, which gives them the credit and *currency* of money to all intents and purposes. They are as much money as guineas themselves are, or any other *current* coin that is used in common payments as money or cash.

"They pass by a will which bequeaths all the testator's money or cash, and are never considered as securities for money, but as money itself. Upon Lord Ailesbury's will, £900 in bank-notes was considered as cash. On payment of them, whenever a receipt is required, the receipts are always given as for money, not as for securities or notes.

"So, on bankruptcies, they cannot be followed as identical and distinguishable from money, but are always considered as money or cash.

"It is a pity that reporters sometimes catch at quaint expressions that may happen to be dropped at the bar or bench, and mistake their meaning. It has been quaintly said 'that the reason why money cannot be followed is because it has no ear-mark;' but this is not true. The true reason is, upon account of the *currency* of it it cannot be recovered after it has passed in *currency*. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and *bona fide* consideration; but before money has passed in *currency*, an action may be brought for the money itself. . . .

"Apply this to the case of a bank-note: an action may lie against the finder, it is true (and it is not at all denied), but not after it has been paid away in *currency*. And this point has been determined, even in the infancy of bank-notes; for 1 Salk., 126, M. 10, W. 3, at *nisi prius*, is in point. . . .

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"Another case cited was a loose note in 1 *Ld. Raym.*, 738, ruled by *Ld. Ch. J. Holt*, at Guildhall, in 1698, which proves nothing for the defendant's side of the question; but it is exactly agreeable to what is laid down by my *Ld. Ch. J. Holt* in the case I have just mentioned. The action did not lie against the assignee of the bank-bill, because he had it for a valuable consideration.

"In that case he had it from the person who found it; but the action did not lie against him, because he took it in the course of *currency*, and therefore it could not be followed in his hands. It never shall be followed into the hands of a person who, *bona fide*, took it in the course of *currency*, and in the way of his business.

"A bank-note is constantly and universally, both at home and abroad, treated as money — as cash; and paid and received as cash; and it is necessary for the purposes of commerce that their *currency* should be established and secured."

This case was approved or followed in *Clarke v. Shee*, *Cowper*, 197; *Lowndes v. Anderson*, 13 *East*, 130; *Solomons v. The Bank*, *id.*, 135; *Wright v. Reed*, 3 *D. & E.*, 554; *Camidge v. Allenby*, 6 *B. & C.*, 373; *De la Chaumette v. The Bank*, 9 *B. & C.*, 208; *Snow v. Peacock*, 3 *Bing.*, 406; *Strange v. Wigney*, 6 *Bing.*, 667, and other cases. And the opinion of Lord MANSFIELD goes far to make the word "*currency*" equivalent to the word "*money*."

It has also been very generally followed in this country. In *Bank of U. S. v. Bank of Georgia*, 10 *Wheat.*, 333, Mr. Justice STORY, in delivering the opinion of the court, says: "Bank-notes constitute a part of the common *currency* of the country, and ordinarily pass as money. When they are received as payment, the receipt is always given for them as money. They are a good tender as money, unless specially objected to; and, as Lord MANSFIELD observed in *Miller v. Race*, 1 *Burr. Rep.*, 457, they are not, like bills of exchange, considered as mere securities or documents for debts."

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Here is a distinction, recognized in many of the cases, between currency which is money and currency which is legal tender. To be money, part of the circulating medium, it is not essential that currency should be legal tender against the wishes of the person to whom it is tendered. Even coined money is not, under all circumstances, legal tender. *Sears v. Dewing*, 14 Allen, 413; *Mather v. Kinike*, 51 Pa. St., 425.

But paper currency, bank-notes which are current *de jure et de facto*, are legal tender unless specially objected to at the time of tender, for the reason that they are money, though not absolutely legal tender. With some exceptions this doctrine is general in this country. *Thompson v. Riggs*, 5 Wall., 663; *Veazie Bank v. Fenno*, 8 Wall., 533; *Hepburn v. Griswold*, id., 603; *Legal Tender Cases*, 12 Wall., 457; *Young v. Adams*, 6 Mass., 182; *Snow v. Perry*, 9 Pick., 539; *Wood v. Bullens*, 6 Allen, 516; *Bush v. Baldrey*, 11 Allen, 367; *Moody v. Mahurin*, 4 N. H., 296; *Cummings v. Putnam*, 19 N. H., 569; *Brown v. Simons*, 44 N. H., 475; *Frothingham v. Morse*, 45 N. H., 545; *Keith v. Jones*, 9 Johns., 120; *Judah v. Harris*, 19 Johns., 144; *Leiber v. Goodrich*, 5 Cow., 186; *Pardee v. Fish*, 60 N. Y., 265; *Frank v. Wessels*, 64 N. Y., 155; *Mann v. Mann*, 1 Johns. Ch., 231; *Bayard v. Shunk*, 1 W. & S., 92; *Legal Tender Cases*, 52 Pa. St., 9; *Buchegger v. Shultz*, 13 Mich., 420; *Williams v. Rorer*, 7 Mo., 556; *Seawell v. Henry*, 6 Ala., 226; *Ball v. Stanley*, 5 Yerger, 199; *Cooley v. Weeks*, 10 Yerger, 141; *Nos v. Hodges*, 3 Humph., 162. Several of these cases will be found to hold that while gold and silver were at a high premium above paper, and not circulated as money, coin was not to be considered as currency but as a commodity; that the whole currency of the country then consisted of paper money, circulation at par being an essential quality of currency.

In fact almost all civilized countries, including this country, have a mixed circulation of coin and bank-notes. These con-

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stitute the currency of the country — its money; and the general term, currency, includes both. Currency, therefore, means money — coined money and paper money equally. But it means money only; and the only practical distinction between paper money and coined money, as currency, is that coined money must generally be received, paper money may generally be specially refused, in payment of debt; but a payment in either is equally made in money — equally good. The confusion in the cases appears to have arisen for want of proper distinction between money which is current and money which is legal tender. The property of being legal tender is not necessarily inherent in money; it generally belongs no more to inferior coin than to paper money.

In the use of the term, currency does not necessarily include all bank-notes in actual circulation; for all bank-notes are not necessarily money. In this use of the term, currency includes only such bank-notes as are current *de jure et de facto* at the *locus in quo*; that is, bank-notes which are issued for circulation by authority of law, and are in actual and general circulation at par with coin, as a substitute for coin, interchangeable with coin; bank-notes which actually represent dollars and cents, and are paid and received for dollars and cents at their legal standard value. Whatever is at a discount — that is, whatever represents less than the standard value of coined dollars and cents at par — does not properly represent dollars and cents, and is not money; is not properly included in the word currency. In this sense, national bank-notes, which are not legal tender, are now as much currency as treasury notes, which are legal tender.

This construction of the term, currency, might, perhaps, properly be extended to the term, current funds. It must extend to the latter term whenever it is used in the legal sense of money. Bankers and money-dealers cannot, by choice or use of terms, give the character and attributes of money to anything not money — to anything of less value than money.

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The legislature has doubtless power to make negotiable paper other than for the payment of money (*Price v. Ina Co.*, 43 Wis., 267); but where a statute is plainly intended to apply to money, every term used to indicate money, not commodities, must be held to signify money in the sense in which that term is here used.

The certificate of deposit in this case calls for so many dollars; that is to say, for so much money. It makes them payable in currency, which also means money. It could be paid only in money. It was, therefore, clearly negotiable under the statute of Anne. Whether the holder could claim its payment in legal tender is a different question, not in this case, and not passed upon.

So far, the question has been considered under the law as it stood when *Ford v. Mitchell*, *Platt v. Bank* and *Lindsey v. McClelland* were decided; and, in upholding the negotiable quality of the certificate of deposit in this case, it has not been found necessary expressly to overrule any of those cases; hardly any of the language used in the opinions given upon them. But, before the certificate of deposit here was made, chapter 5 of 1868 had amended the statute governing such paper. The amendment makes the section embrace certificates of deposit, which was quite unnecessary, because this court had held four years before that such an instrument payable in money is negotiable. *Lindsey v. McClelland*, *supra*. The effective part of the amendment was the insertion of the word *as* between the words *any sum of money*, and the words *therein mentioned*, so as to make the section declaring instruments negotiable to read, "whereby he shall promise to pay to any person or order, or unto the bearer, any sum of money, as therein mentioned," instead of "any sum of money therein mentioned," etc. The littleness of the word introduced by the amendment was learnedly scoffed at by counsel, forgetting that little words as often control meaning as big ones — perhaps oftener; and that the rule of construction, to give effect,

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if possible, to every word in a statute, applies *a fortiori* to a word introduced by amendment. As the words *therein mentioned* stood in the original section, they merely applied to the sum of money itself. As controlled by the word introduced by the amendment, they mean the sum of money *as it is therein mentioned*. That cannot mean the terms or conditions of payment, as both the original and the amended section declare that the money shall be due and payable as therein expressed, and the words *as therein mentioned*, in the amended section, appear susceptible of no construction except the kind of money therein mentioned.

The learned counsel for the respondent was at the pains of showing that the amended section, as introduced in the legislature, read any sum of money, *in coin or currency*, as therein mentioned; and that the words, *in coin or currency*, were stricken out before the passage of the section. And he argued with great force that the legislature had refused to make negotiable paper payable in currency. But the argument would apply as well to coin. It is impossible now to say why the words were stricken out. It may have been because they were considered unnecessary, as this court considers them, to the purpose of the section. It may have been, as was suggested from the bench during the argument, because the legislature feared that the words might restrict the negotiability of instruments to such as should be expressly payable either in coin or in currency. Certainly the meaning of the section is broader without the words than it would have been with them. As it is, it extends negotiability to all instruments payable in money, without reference to the kind of money; unless the kind be mentioned in the instrument itself. In *Platt v. Bank*, Judge Dixon had said: "If the legislature deem it expedient to declare such instruments negotiable, they have the undoubted power to do so." Perhaps the amendment was in answer to that suggestion, and was intended to overrule *Ford v. Mitchell*, *Platt v. Bank* and *Lindsey v. McClelland*. It was certainly

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intended to change the statute, and perhaps did change it as now indicated.

The amendment has no further effect on this decision than to relieve the court of the responsibility, and lay it on the legislature; for the amended section in effect declares the law to be what this court declares it was without the amendment.

The negotiability of certificates of deposit is of vast importance in commerce. Their want of negotiability upon slight grounds would go largely to prevent their usefulness in the course of business; and this court considers it far wiser to hold them payable in money, when the terms used will admit of that construction, than to hold them not to be negotiable on the ground of the particular terms used.

By the Court.—The judgment is reversed, and the cause remanded to the court below with directions to render judgment for the garnishee, the appellant here.

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VOLUNTARY ASSIGNMENTS *for the benefit of creditors: Sureties.*

1. Under the statutes of this state relating to voluntary assignments for the benefit of creditors, sureties upon the assignee's bond are not *responsible* or *sufficient* unless they are freeholders in this state.
2. If the proof made by the sureties, purporting to be made under oath, at the time of the taking of the bond, shows that they were sufficient, within the meaning of the statute, and the proper officer approved of them, the assignment cannot be avoided by contradicting the affidavits of the sureties, nor by proof that the oath was not in fact administered, unless it be shown that the assignment was made for the purpose of hindering, delaying or defrauding creditors.

APPEAL from the Circuit Court for *Dane* County.

The case is thus stated by Mr. Justice TAYLOR:

"This is an action of replevin. The plaintiff claims the prop-

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erty as the assignee of Bernard Kohner, by virtue of an assignment made under the provisions of chapter 63, R. S. 1858, as amended by chapter 64, Laws of 1858. The defendant, as sheriff of Dane county, claims the goods by virtue of a levy thereon made by him upon two executions issued out of the circuit court of said county upon two judgments rendered in favor of the plaintiff in two separate actions against said Bernard Kohner. The assignment was executed and delivered, and the assignee took possession of the goods, before the executions were levied. The sheriff having taken possession of the goods by virtue of his levy, the assignee brought this action of replevin to recover the possession thereof.

"This case has been in this court before upon an appeal by the present defendant; and upon that appeal this court held that the bond given by the assignee was sufficient in form, and the assignment was not void on account of any insufficiency in the form of the bond itself. See *Klauber v. Charlton*, 45 Wis., 600.

"Upon a retrial of the case the plaintiff had judgment in the court below; and the defendant appeals and alleges as error that the court below excluded evidence offered on his part for the purpose of showing that Thuringer, one of the sureties on the bond of the assignee, was not 'a freeholder of this state.'

"The evidence on the part of the plaintiff showed that a bond sufficient in form, as this court held upon the former appeal, had been given by the respondent upon the assignment of the property to him; and that Thuringer and Samuel Klauber, the sureties to such bond, had each made the following affidavit:

"*'State of Wisconsin, County of Dane — ss.:*

"[Name of surety], one of the sureties of the foregoing bond, being duly sworn, says: That he is a resident and freeholder within this state, and that he is worth the sum of — thousand dollars, over and above all his debts and liabilities,

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and exclusive of property exempt by law from execution, in property situate in said state of Wisconsin.

“ [SIGNED BY SURETY.]

“ Subscribed and sworn to before me this 4th day of February, A. D. 1878.

“ ALDEN S. SANBORN,

“ County Judge, Dane county, Wis.’

“ On the back of the bond was the following indorsement:

“ I hereby approve of the written bond, and of the sufficiency of the sureties therein.

“ Dated February 4, 1878.

“ ALDEN S. SANBORN,

“ County Judge of Dane county, Wis.’

“ Thuringer justified in the sum of \$5,000, and Klauber in the sum of \$15,000.”

The cause was submitted on the brief of *Vilas & Bryant* for the appellant, and that of *Sloan, Stevens & Morris* for the respondent.

For the appellant it was argued, 1. That the statute in force at the time of the assignment in question, in clear and plain terms, declared such an assignment absolutely void as against creditors, where the assignee's bond was not signed by two or more “freeholders of this state” as sureties; that the statute requires of such sureties, first, that they shall be “sufficient,” and then, *as an additional qualification*, that they shall be freeholders of this state; that it does not require the surety to state in his affidavit the fact that he is such a freeholder, nor does it require the officer to know that fact, or commit to him any judgment upon it; that it prescribes distinctly two qualifications for a lawful surety: first, a simple *matter of fact*, that he is a freeholder of this state; second, that he shall, by his affidavit, testify to his pecuniary responsibility, and satisfy the officer that his property, being within this state, is worth, with that of the other sureties, the sum specified in the bond. The latter qualification involves matter of judgment upon the value of property, and is complete when the favorable opinion

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of the officer is secured upon the prescribed proof. The former qualification involves no opinion; it must be true in fact; and hence it is neither necessary for the surety to swear to it then, nor for the officer to pass any opinion upon it. The fact that the surety was such a freeholder must be established when the validity of the assignment is drawn in question; and it is enough that it is *then* established. No argument against this can be derived from the requirement that the sureties "shall each testify as to his responsibility." The word "responsibility" relates only to the surety's possession of sufficient property liable to the payment of his debts, and is fully satisfied by personal estate; while, on the other hand, the ownership of a homestead would make him a freeholder, but add nothing to his legal responsibility. (Compare, on this word, R. S., sec. 2771.) And the words which immediately follow the word "responsibility," show that the latter word is used in the sense above defined. Nothing is required of the officer but to express his satisfaction that the property of the sureties is *worth in the aggregate* the sum specified in the bond. Counsel further argued that the statute was a remedial one, designed to protect creditors from the flagrant abuses previously existing under the common law; and that it should be construed liberally, and full effect given to it, for that purpose. *Churchill v. Whipple*, 41 Wis., 611; *Smith v. McCulloch*, 42 id., 564; *Hardmann v. Bowen*, 39 N. Y., 196; *Britton v. Lorenz*, 45 id., 51; *Fairchild v. Gwynne*, 16 Abb. Pr., 23.

2. That in this case the appellant offered to show, not only that the surety was not a freeholder of this state, but that he did not in fact testify by his affidavit that he was a freeholder; that when he signed what purported to be the affidavit, he did not know that it contained a statement that he was a freeholder; and that he was not sworn to it in any manner by the officer. If he had been a freeholder in fact, the objection that he was not formally sworn might savor of technicality. But when it appears that this essential qualification was wanting; that no

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affidavit or testimony as to its existence was given; and that he unwittingly signed his name to a false statement, prepared by others for him to sign, by which the county judge was deceived into action which he was not authorized to take — how can it be held that third parties, not participating, can be cheated of their security, and the provisions of the law thus defeated?

For the respondent it was argued, that, by the statute in force at the time, the whole matter of the responsibility of the sureties was intended to be submitted to the decision of the officer taking the bond; that all the elements which are made necessary to qualify a person to become a surety, constitute his "responsibility;" that the statute requires evidence to be produced before the officer that all these elements exist, to enable him to decide whether the sureties offered are responsible; and that the decision of the officer is conclusive. *Anon.*, Loft, 145; *Churchill v. Whipple*, 41 Wis., 615. It was further argued that the affidavits in these cases, like those on which attachments are issued, and those on which defendants are held to bail, are conclusive. *Conklin v. Dutcher*, 5 How. Pr., 387, and cases there cited.

TAYLOR, J. The only question arising upon this appeal is, whether it was competent for the defendant to show that one or both of the sureties were not in fact freeholders within this state at the time of signing the bond, for the purpose of avoiding the assignment under the statute.

The statute above cited declares that the assignment shall be void as to the creditors of the assignee, unless, among other things, a bond shall be given "in such sum not less than the whole amount of the nominal value of the assets of such assignor, which value shall be ascertained by the oath of one or more witnesses and of the assignor, with two or more sufficient sureties, freeholders of this state, who shall each testify as to his responsibility, and by their several affidavits satisfy

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the officer taking such bond that the property of such sureties, being within this state, is worth in the aggregate the sum specified therein."

Previous to the enactment of this statute, it was competent for a debtor to make an assignment of his property to any person of his choice for the benefit of his creditors, without requiring such assignee to give any security for the faithful performance of the trust reposed in him; and his creditors would be bound by such assignment, in the absence of fraud. The fitness or unfitness of the assignee to discharge the trust could not be inquired into in a collateral action by a creditor, except for the purpose of showing the fraudulent intent of the assignor in making the assignment. Bump on Fraudulent Conveyances, 367, 368; Burrill on Assignments, § 92; *Angell v. Rosenbury*, 12 Mich., 241, 255, 256; *Guerin v. Hunt*, 6 Minn., 375; *Cram v. Mitchell*, 1 Sandf. Ch., 251; *Currie v. Hart*, 2 Sandf. Ch., 353.

The statute above cited was passed for the purpose of compelling assignees to give security for the faithful performance of their duties as such, and thereby afford some assurance to the creditors that the property assigned would be faithfully administered for their benefit; and it declared all assignments absolutely void which were not made to some resident of this state, and where the assignee did not give the bond required by such act. The statute provides that the amount of the penalty of the bond shall be fixed by the oath of two witnesses and that of the assignor, swearing to the nominal value of the assets, and that the sureties to the bond shall testify as to their responsibility, and by their several affidavits satisfy the officer taking the bond that the property of such sureties, being within this state, is worth in the aggregate the penalty of the bond. It will be observed that the whole proceeding is *ex parte* in its nature, as no notice is required to be given to any person interested; but the method of doing the same is particularly prescribed by the statute, so far as the penalty of

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the bond and the sufficiency of the sureties are concerned; and the statute having provided no method of reviewing these proceedings, they are, when made as the statute directs, conclusive upon all parties interested, unless impeached for fraud.

This court has substantially held, in the case of *Hutchinson v. Brown*, 33 Wis., 465, that the statutory method of fixing the penalty of the bond must be followed, and that when it is so fixed it cannot be impeached in a collateral action, because it was not in fact given for either the real or nominal value of the assets. The method prescribed by statute having been in fact substantially complied with, it must stand until set aside for fraud or other sufficient cause, in an action brought for that special purpose, in which all parties having an interest can be heard; and in the case of *Churchill v. Whipple*, 41 Wis., 611, it is expressly held that the pecuniary ability of the sureties must be ascertained in the way pointed out by the statute, and cannot be ascertained in any other way. It was held that, because the affidavit of the sureties did not show that they were worth the required amount in property within this state, the bond was void, and that it could not be validated by showing that fact in any way or manner other than by their affidavits, made before or delivered to the officer at the time of his reception of the bond. Justice LYON, who delivered the opinion in that case, says: "Notwithstanding the very ingenious argument of the learned counsel for the plaintiff in support of the opposite view, it seems very clear to our minds that the statute requires such fact to be shown by the affidavits of the sureties, and that in no other way can it be made to appear that they have the requisite property in this state. The plain meaning of the statute is, that the assignment shall be void unless the sureties shall satisfy the officer taking the bond that they have the requisite property in this state, and that this can only be done by the affidavits of the sureties themselves."

Like the preliminary affidavit which the statute requires

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to be made before an attachment against the property of a debtor shall issue, it must conform to the requirements of the statute, and unless it so conforms the attachment is void, and no amount of other evidence of the fact required to be stated in such affidavit can be substituted therefor. And when the affidavit conforms to the statutory requirements, no amount of testimony can impeach it, unless the statute provides that it may be impeached and points out the manner of impeaching the same.

The only question, therefore, under the decisions of this court, is whether it is the duty of the officer by whom the bond is taken to inquire as to the qualification of the sureties, as well as to their pecuniary responsibility. The only qualification of the sureties, other than that they have the necessary property in this state, is that they shall be freeholders of this state.

Taking all the provisions of the statute together, we are of the opinion that it was the intention of the legislature to submit to the officer to whom the bond is to be given, all questions as to the qualifications as well as the pecuniary responsibility of the sureties; and that when such officer certifies his approval of the sureties, and the affidavits as to the value of the assets and the responsibility of the sureties are made as required by the statute, and the bond is in the form and for the penalty prescribed and fixed by the proper affidavits, it is conclusive upon all parties interested in every collateral action, unless it be shown by the creditor attacking the assignment that it was made for the purpose of hindering, delaying or defrauding the creditors of the assignor, within the meaning of section 2320, R. S. 1878.

The statute provides that the sureties shall be "freeholders of this state, who shall each testify as to his responsibility, and by their several affidavits satisfy the officer," etc. This language, though not the most clear and unambiguous, yet, when taken in connection with the whole object of the statute,

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seems to us to indicate that the sureties must testify under oath to all the facts necessary to show that they are not only responsible in a pecuniary point of view, but that they have the qualifications which the statute requires, viz., that they are freeholders of the state. The fact of their being freeholders is made by the statute an essential part of their responsibility. They might each be worth ten times the sum required in property within this state, yet, if they were not "freeholders of this state," they would not be sufficient and responsible sureties within the meaning of the statute. If the proof made by the sureties at the time of taking the bond shows that they are sufficient within the meaning of the statute, and the officer approves of them, the assignment cannot be avoided by contradicting the affidavits made by the sureties, unless the proofs go to the extent of showing that the assignee knew that the sureties were not freeholders, or corruptly or fraudulently procured the making of such affidavit. Such evidence would attack the *bona fides* of the assignment, and could undoubtedly be received.

Nor can the assignment be avoided by showing that the affidavits of the sureties, which are certified to have been sworn to, were not in fact sworn to, except, perhaps, when such evidence is offered in connection with other evidence for the purpose of showing the fraudulent nature of the assignment. See *Rex v. Smith & Hornage*, 1 Stark., 242; *Rex v. Rivers*, 7 C. & P., 177; *Reg. v. Pikesley*, 9 C. & P., 124; *Eastman v. Bennett*, 6 Wis., 232-243; *Frederick v. Clark*, 5 Wis., 191; *Carr v. Bank*, 16 Wis., 50. As the evidence offered in this case was offered solely for the purpose of showing that the assignment was void as not being in compliance with said chapter 63, we think it was properly excluded.

The general rule is, that when an oath is required to be made before an officer, whose duty it is to certify such oath, such oath can only be proved by the production of the proper written evidence, and when produced is conclusive evidence of

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the facts therein stated, except, perhaps, in a direct proceeding to set the same aside, or when it has been fraudulently made (1 Wharton on Criminal Law, § 659; 1 Greenleaf on Evidence, § 86; *Bassett v. Marshall*, 9 Mass., 312; *Tripp v. Garey*, 7 Greenl. (Me.), 266; *Dole v. Allen*, 4 Greenl., 527; *Harris v. Whitcomb*, 4 Gray, 433); and the same rule is approved by this court in *Lederer v. Railroad Co.*, 38 Wis., 244, and *Wright v. Fallon*, ante, p. 488.

In the latter case this court held, that because the affidavit for an appeal from a justice's judgment was not signed by the appellant or any one in his behalf, though certified by the justice to have been sworn to, it was not sufficient to give the appellate court jurisdiction, and that the defect could not be supplied by parol evidence; and in the case of *Lederer v. Railroad Co.*, where a similar affidavit was not signed by the officer administering the oath, the court allowed the same to be perfected, upon proof that the oath was in fact administered, by allowing the officer who had administered the same to sign his name to the *jurat* as of the day it was made. Both cases clearly recognize the rule, that when the law requires an oath to be in writing and certified, no proof of the oath can be given, except by the production of the writing itself, properly certified, unless the same, having once existed in writing, has been destroyed or lost.

By the Court.—The judgment of the circuit court is affirmed.

MELLEN and others vs. GOLDSMITH.*Oral agreement as to composition deed.*

If a creditor, after an oral agreement with the debtor and *with other creditors* to join with the latter in executing a composition deed at a specified rate, and after such deed has been executed, in pursuance of the agreement, by such other creditors, refuses to sign it, he can recover only the rate fixed in the agreement.

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APPEAL from the County Court of *Milwaukee* County.

The plaintiffs, merchants in New York city, brought this action against the defendant, a merchant doing business in the city of Milwaukee, upon a note and a book account for goods sold, with interest from the dates when they respectively became due. The defense was, that plaintiffs, by agreement with defendant and his other creditors, had become bound to accept in satisfaction of their said claims sixty per cent. thereof in three installments payable respectively in three, six and nine months from November 1, 1877, without interest, secured by defendant's indorsed notes, or fifty per cent. in cash payable November 15, 1877; that plaintiffs afterwards refused to elect and inform defendants whether they would accept the cash or the notes under said agreement; and that defendant had tendered plaintiffs sixty per cent. of the amount of their claims, had ever since kept the money ready for them, and now brought it into court for their use.

The evidence was voluminous, and will not be stated.

The court instructed the jury as follows: "It appears that plaintiffs, with a large number of other business men, living in the cities of New York, Boston, Philadelphia and elsewhere, are creditors of the defendant; and that defendant, being in embarrassed circumstances, visited his creditors in the city of New York with a view of affecting a compromise. It appears that, in pursuance of that idea, he called upon the plaintiffs, and that upon their suggestion, according to the testimony of the defendant, a meeting of creditors was called in New York city, at which the plaintiffs were present, or one of the plaintiffs was present representing the firm, and a large number of other creditors. You have heard what occurred at that meeting, and what were the results of the deliberations of the creditors assembled there; and you have also heard what took place, and what defendant did, after the assembling of that meeting, and the resolution passed there with a view of effecting a compromise at sixty cents upon the dollar. It appears

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from the uncontradicted testimony, that defendant subsequently went to his creditors, and procured the signatures of all the other creditors to the compromise paper in evidence here, and then went to these plaintiffs and requested them also to sign it; and they refused to sign unless he would give ten cents in addition to the compromise agreed by all the creditors and agreed to be received by those present at the meeting. . . . The only question is, whether, the plaintiffs having failed to sign the compromise paper itself, there are other facts outside of it sufficient to satisfy you that it was entered into with their assent and with their approbation, or by reason of their acts with reference to it giving defendant and the other creditors to understand that, after all the others signed the paper, they would sign it also; whether those acts will preclude them from recovering the whole amount of their claim; whether they are estopped now from claiming any more than the other creditors. . . . This is the only question in the case, and more a question of law than anything else; and although, from the examination I have given it, the question is not entirely free from doubt, yet it is one of those cases in which, if plaintiffs would not be estopped from now demanding more than the other creditors, under the circumstances, it would be a fraud upon the other creditors. That is, if defendant, after all that took place there, according to the facts and circumstances of this case, if he, after having obtained the signatures of all the other creditors, had then, with a view of securing this one creditor, offered to give him ten cents more upon the dollar, or agreed to give ten cents more upon the dollar to obtain his signature to the paper, it would have been a fraud upon the other creditors. It is naturally understood by all the other creditors, where they accept a compromise, that it is upon an equal footing; and these compromises are held to be binding when made; and when one is given more than the others, it is considered a fraud upon the balance of the creditors. Therefore, if plaintiffs acceded to the proposition, either by word

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of mouth, or by representation to defendant and the other creditors; or if by their acts with reference to this whole transaction, taking into consideration what took place at and after the meeting, they led defendant and the other creditors to believe that they were satisfied with that compromise and would abide by it — they were estopped, after the others had signed it, from refusing to carry out the arrangement, and cannot now recover anything in addition to what the other creditors received. . . . If, however, plaintiffs not only have never signed this compromise, but never agreed to sign it, or [if they] made it manifest to defendant, and the other creditors who were present understood, that they never intended to sign it, then they were not bound by the action of the other creditors, and are entitled to recover the full amount of their claim; otherwise defendant is entitled to a verdict.”

Instructions were asked for plaintiffs, and refused, the substance of which was, that the oral agreement set up in the answer was invalid and no defense.

There was a verdict for the defendant; a new trial was denied; and from a judgment pursuant to the verdict, plaintiffs appealed.

The cause was submitted for the appellants on the brief of *J. F. McMullen*. He contended, 1. That the utmost that was shown by defendant's evidence, was an oral statement by one of the plaintiffs, made before the creditors' meeting was held, that whatever that meeting should decide to do, he would abide by; that there was no evidence of a subsequent agreement by plaintiffs, either at or after the meeting, to compromise on the terms there voted, but clear evidence that *Mellen* reserved the question for further consideration, and, immediately after the meeting, when the other creditors were signing the written compromise, refused to sign it. 2. That such oral agreement was not a valid contract. *Lowe v. Eginton*, 7 Price, 604; *Palmer v. Yager*, 20 Wis., 92, 100. Counsel further cited and distinguished *Lathrop v. Knapp*, 27 Wis.,

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225; *Johnson v. Parker*, 34 id., 596; *Wood v. Roberts*, 2 Starkie, 417. 3. That the court erred in rejecting evidence offered by plaintiffs, first, of what actually occurred at the creditors' meeting; second, of facts tending to show that defendant procured the compromise by fraudulent concealment of assets, which would have avoided the agreement (*Vine v. Mitchell*, 1 Moody & Rob., 337; *Wenham v. Fowle*, 3 Dowl. P. C., 43); and third, of admissions by defendant, long after the date of the compromise, showing that he then understood that plaintiffs had never agreed to it. 4. That the court erred in its charge to the jury: (1) In stating that the compromise was agreed to by *all the creditors*. (2) In stating that, "if plaintiffs would not be estopped from now demanding more than the other creditors, under the circumstances, it would be a fraud on the other creditors:" an instruction which virtually took the case from the jury. True, other parts of the charge are inconsistent with this; but the judgment should be set aside because it is not certain to which part of the charge the jury gave heed. *Imhoff v. Railway Co.*, 20 Wis., 344; *Wells v. Perkins*, 43 id., 160; *Regan v. The State*, 46 id., 256; *State v. Snell*, id., 524.

For the respondent, there was a brief by *Carpenter & Smiths*, and oral argument by *Winfield Smith*. They argued, among other things, 1. That an agreement between a debtor and his creditors for a composition need not be in writing, but may be proved by any words or acts equivalent to a promise, or estopping the parties to deny a promise. *Butler v. Rhodes*, 1 Esp., 236; *Fawcett v. Gee*, 3 Anst., 910; *Bradley v. Gregory*, 2 Campb., 383; *Good v. Cheesman*, 2 B. & Ad., 328; *Wood v. Roberts*, 2 Starkie, 417; *Anstey v. Marden*, 1 Bos. & Pul., N. R., 124; *Gardner v. Lewis*, 7 Gill, 377; *Browns v. Stackpole*, 9 N. H., 478; *Fellows v. Stevens*, 24 Wend., 294; *Paddleford v. Thacher*, 48 Vt., 574; *Gauger v. Pautz*, 45 Wis., 449; *Lathrop v. Knapp*, 27 id., 227; *Perkins v. Lockwood*, 100 Mass., 250. 2. That the evidence re-

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jected, being portions of the answers in certain depositions, was properly rejected as not responsive to the interrogatories.

ORTON, J. There was testimony tending to show that the appellants verbally agreed with the respondent and his other creditors that they would compromise their claims against him, and sign a deed of composition for sixty cents on the dollar, in consideration and upon the condition that the other creditors would do so; and that the other creditors did so compromise and sign such deed, and the appellants refused to do so, and refused to accept such per cent. in satisfaction of their claim tendered for such purpose by the respondent.

The jury probably and very properly might have found their verdict upon this evidence, and this court ought not to disturb the verdict upon the mere weight or preponderance of the evidence.

The evidence relating to the proceedings of the creditors' meeting, and their action upon the proposition of the respondent, is not material, when it was shown — and it is not disputed — that immediately thereafter all of the creditors except the appellants signed the composition according to the agreement which the jury must be presumed to have found was so made by the parties and the other creditors.

The exceptions taken to the rulings of the court in admitting or rejecting testimony, and in giving or refusing to give instructions to the jury relating to such meeting or its proceedings, are therefore immaterial, and will not be further considered.

The instructions given clearly express the law upon the legal effect of such an agreement, and submit to the jury the question of fact; and, although there may be some clauses and abstract propositions of law not strictly correct, the charge taken together and fairly construed did not, we think, mislead the jury upon the material question in the case.

The really important and only material question here is, Was

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this agreement valid and binding upon the appellants, so that its performance by the other creditors and the respondent, in respect to their claims, and the offer of performance by the respondent in respect to the claims of the appellants, constitute a valid defense to this action, brought to recover the full amount?

The validity of such an agreement does not depend upon the technical and strict rules which govern accord and satisfaction, release and discharge, but upon principles of equity, which treat the violation of or failure to execute such an agreement as a fraud, not only upon the debtor, but more especially upon the other creditors, who have been lured in by the agreement to relinquish their further demands, upon the supposition that the debtor would thereby be discharged of the remainder of his debts. In *Anstey v. Marden*, 1 Bos. & Pull., 124, the plaintiff at one time orally agreed with the other creditors to accept a composition of ten shillings on the pound, and to assign his claim to Weston, who was to advance the money; but when the agreement was drawn up he refused to sign it, although the other creditors had signed it and received their money. ROOKE, J., said: "Anstey is not the only person here concerned. If he were suffered to recover, he would be guilty of a gross fraud on the other creditors."

In *Norman v. Thompson*, 4 Exch., 755, the plaintiff verbally agreed with the debtor defendant and a part of his other creditors, that he would accept ten shillings on the pound for his claim, if they would do the same, and afterwards refused to carry out the agreement. Upon demurrer to the replication of the plaintiff, averring that he did not so agree, *modo et forma*, POLLOCK, C. B., said: "I do not think there is any ground for doubting that such an agreement is binding. It is a good consideration for one to give up part of his claim, that another should do the same."

In *Bradley v. Gregory*, 2 Campb., 383, the plaintiff verbally agreed with the debtor and the other creditors to execute

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a composition deed, containing a clause of release, for and by the payment of ten shillings on the pound of his claim, if the other creditors would do so, and then, upon the execution of the deed by the other creditors, he refused to sign it. Lord ELLENBOROUGH said: "I think the agreement in the present case operates as a satisfaction. But it is said the agreement is executory, and therefore can be no bar. I think it is executed. Everything on the defendant's part was performed. As far as depended upon him, there has been satisfaction as well as accord. It is the plaintiff's own fault that he has not enjoyed the full benefit of all that he stipulated for. It would be unjust if the defendant could be sued in this action; and I am of opinion that, in point of law, the action is not maintainable."

In *Wood v. Roberts*, 2 Starkie R., 417, in which the facts are similar to those here, ABBOTT, L. C. J., said: "If the plaintiff had, by his undertaking to discharge the defendant, induced any other creditor to accept a composition and discharge the defendant from further liability, he could not afterwards enforce his claim, since it would be a fraud upon that creditor."

In *Butler v. Rhodes*, 1 Esp., 236, the plaintiff and the other creditors had agreed with the defendant to sign a deed of composition for ten shillings on the pound; and after the other creditors had signed, the plaintiff refused to do so. Lord KENYON said that "it therefore never should be allowed to the plaintiff to recede from what he had undertaken, and to evade the effect of the composition by a refusal to execute the deed which had been prepared with his consent," and directed the jury to find for the defendant.

Anything I could say in elaboration of this doctrine so authoritatively established and so tersely expressed by these great masters of the law, might weaken its force, and it is sufficient further to say that this equitable doctrine has been followed almost uniformly by the courts. *Fellows v. Stevens*,

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24 Wend., 294; *Browne & Co. v. Stackpole*, 9 N. H., 478; *Paddleford v. Thacher*, 48 Vt., 574; *Gardner v. Lewis*, 7 Gill, 377; *Farrington v. Hogdon*, 119 Mass., 453; *Murray v. Snow*, 37 Iowa, 410.

By the Court.—The judgment of the county court is affirmed, with costs.

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CONTRACT: LANDLORD AND TENANT: EQUITY. (1) *Lease construed.* (2) *Rights of lessee lawfully holding over until his improvements are paid for.* (3) *Practice and Pleading in Equity: supplemental answer: new parties.* (4) *Equity: Tax deeds cancelled.*

1. A lease of an unimproved city lot provided that in case the lessee should make improvements on the premises during the term, it should be optional with the lessor either to have such improvements appraised by arbitrators at the end of the term, "without regard to the situation or value of the premises leased," and pay the lessee such value, or to have the leased premises appraised in like manner, "without regard to the improvements," and renew the lease, etc. The lessee, during his term, built a dwelling house on the lot, and made other valuable improvements suitable for a residence. *Held*,

(1) That, upon the lessor's refusal to renew, the value of *all* such improvements should be allowed to the lessee, and not merely of those which, as between landlord and tenant, might be removed by the latter.

(2) That the *present actual value* of the improvements, treating the property as a *residence*, is the value to be allowed.

2. The judgment of this court on a former appeal herein was remitted in April, 1868, directing the court below to ascertain the value of the improvements made by the plaintiff lessee, and that he be permitted to retain possession until such value was paid to him by the lessor. *Hopkins v. Gilman*, 22 Wis., 476. The plaintiff remained in possession, and the cause was not again brought to a hearing until 1878. *Held*, that in stating an account between the parties, to determine what sum must be paid by the defendant lessor to entitle him to possession, plaintiff must be regarded as a tenant equitably entitled to hold over, and actually holding over, and must be charged with rent (without interest) and all outstanding taxes (as provided in the lease), and is not to be allowed interest on the value of his improvements for any period whatever.

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3. In 1876, the defendant lessor filed a supplemental answer, alleging, among other things, that the plaintiff lessee, being in possession, had failed to pay the taxes and assessments for 1869 and subsequent years; that an undivided portion of the lot had consequently been sold for delinquent taxes, and a number of tax certificates were outstanding; and that X. and Y. (the lessee's brothers), for the purpose of creating a cloud upon the title, and to hinder defendant in the enforcement of his rights, had procured and recorded two tax deeds, which they held for the benefit of the lessee; and part of the relief asked was, that the lessee procure from X. and Y. deeds of release of their interest under said tax deeds, and that such tax deeds be adjudged fraudulent and void as against said lessor. *Held*, that there was no error in permitting the supplemental answer to be filed, and X. and Y. brought in as parties defendant; especially as they answered the supplemental answer as a cross bill, without objecting to the order.
4. X. and Y. appearing to have taken their tax deeds for the benefit of the plaintiff lessee, the judgment as to them should declare such deeds cancelled.

APPEAL from the Circuit Court for *Milwaukee* County.

A statement of the contract upon which this action was based, will be found in the report of a former appeal herein (22 Wis., 476). The foregoing head notes, and the opinion, *infra*, state the facts sufficiently for the purposes of this appeal.

The circuit court found as a fact, that the value of the improvements put by the original plaintiff upon the lot in question was, in 1868, after the return of this case from the supreme court, \$5,700. It thereupon held that plaintiff was entitled to a judgment against the defendant *Gilman* for \$5,700, with interest thereon at seven per cent. from one year after the date of filing the *remittitur* from the supreme court in the office of the clerk of said circuit court; and that plaintiff was entitled to retain the possession of the property until the judgment should be paid, without prejudice to *Gilman's* right to sue for rent, or for use and occupation; and that the action should be dismissed as to the defendants *Bedford B.* and *Edward C. Hopkins*.

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From a judgment in accordance with these determinations, the defendant *Gilman* appealed.

The original plaintiff, *Otis B. Hopkins*, having died before the judgment was entered, his administratrix was substituted as plaintiff.

Joshua Stark, for the appellant, after arguing at length as to the amount to be allowed for the improvements, contended, among other things, 1. That plaintiff, having continued in possession, was not entitled to interest on the value of the improvements, never liquidated before the findings filed and judgment entered on the last trial of the case. *Marsh v. Fraser*, 37 Wis., 149; *Davis v. Louk*, 30 id., 308, 316; *Hollday v. Marshall*, 7 Johns., 211; *Case of Second St.*, 66 Pa. St., 132. 2. That full relief against all the parties should have been granted in this action, in accordance with the supplemental pleadings and the proofs, and the appellant should not have been turned over to other courts and actions for relief. 1 Story's Eq. Jur., §§ 74 b, 64 k, 455-7; *Prescott v. Everts*, 4 Wis., 319; *Kelley v. Sheldon*, 8 id., 258; *Peck v. School District*, 21 id., 516; *McIndoe v. Mormon*, 26 id., 588; *Akerly v. Vilas*, 15 id., 401; *Morgan v. Hammett*, 34 id., 512, 520; *Turner v. Pierce*, id., 658; *Winslow v. Crowell*, 32 id., 662; *Blodgett v. Hitt*, 29 id., 169. 3. That, in granting such relief, the court should have charged plaintiff with the rent of the lot from the time (May 1, 1865) when he ceased payment of rent. Between the expiration of the lease under which he entered, and the former decision of this court, he was clearly a mere tenant from year to year upon the conditions of the lease (*Gilman v. Milwaukee*, 31 Wis., 563); and this relation of landlord and tenant has never ceased. The former decision herein did not destroy that relation and make him a mere licensee of the court, but affirmed his equitable right, under the provisions of the lease, to retain his possession until paid for his improvements. See *Van Rensselaer v. Penniman*, 6 Wend., 569; *Holsman v. Abrams*, 2 Duer,

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485; 17 N. J. Eq., 51; *Davis v. Louk*, 30 Wis., 308. Until the tenant yields possession to the landlord, he remains liable for rent. *Noel v. McCrary*, 7 Coldw., 623; Taylor's L. & T., sec. 372. This accords with the rule in other and analogous cases. Thus, where the mortgagee of land, after a breach of the mortgage, has obtained peaceable possession, notwithstanding the legal right of the mortgagor to the possession, under our statute, until foreclosure and sale, equity protects the mortgagee in that possession until he is paid in full (*Gillett v. Eaton*, 6 Wis., 30; *Tallman v. Ely*, id., 244; *Stark v. Brown*, 12 id., 572; *Hennesy v. Farrell*, 20 id., 42); but it holds him to account to the mortgagor for the rents and profits, and apply them to the mortgage debt. *Lupton v. Almy*, 4 Wis., 242; *Green v. Wescott*, 13 id., 606; *Ackerman v. Lyman*, 20 id., 454. The same principles have been applied under the "Improvement Act" in this state. *Pacquette v. Pickness*, 19 Wis., 219; *Blodgett v. Hitt* and *Davis v. Louk*, *supra*. See also *McIndoe v. Morman*, *supra*. To the point that plaintiff should be charged for the use of the premises "the rent and taxes stipulated for in the original lease," counsel cited *Taft v. Kessel*, 16 Wis., 273; *Livingston v. Livingston*, 4 Johns. Ch., 291; *Hinsdale v. White*, 6 Hill, 507; *Holsman v. Abrams*, 2 Duer, 435; 13 Johns., 240; 25 N. J. Law, 293. 4. That the court should have rendered judgment in appellant's favor against his codefendants, annulling their tax deeds, and requiring them to execute deeds of release.

D. G. Hooker, for the plaintiff, contended, *inter alia*, 1. That the allowance of interest from April 15, 1869, was no error. The agreement was to pay for the improvements at the end of the term, May 1, 1863. As the tenant held over with the consent of the landlord till May 1, 1865, *Gilman's* liability was to pay the value of the improvements as of that date, and he has been *Hopkins'* debtor for the amount ever since, and should, in strict right, have been required to pay interest from that time. *Atkinson v. Richardson*, 15 Wis.,

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594. True, during this time plaintiff has had possession of the improvements, which belonged to *Gilman*; but *Gilman*, during the same time, has had possession of the money which belonged to plaintiff. Plaintiff did not retain possession of the property as owner, but held it merely as security for the payment of the debt, as any creditor holds collateral security. His occupation of the premises should not prevent his recovery of interest, because the possession could not be retained except by occupation; and it does not appear that the improvements have deteriorated in consequence of the occupation, nor that such occupation has in fact been a benefit to the plaintiff.

2. That the matters set up in the supplemental answer were properly disposed of by the judgment. (1) A cause of action, to be set up by way of counterclaim, must have existed at the commencement of the action (R. S., sec. 2656, subds. 1, 2; *Richard v. Kohl*, 22 Wis., 506; *Scheunert v. Kaehler*, 23 id., 523; *Orton v. Noonan*, 30 id., 611); and a cause of action accruing in favor of defendant after suit brought, cannot be made available by supplemental answer. *Orton v. Noonan*, 29 Wis., 541. (2) Facts cannot be set up by supplemental answer, which are not consistent with and *in aid of* the original defense. *Noonan v. Orton*, 21 Wis., 283. (3) The plaintiff is under no liability *upon the lease* for the payment of the rent or taxes in question, because the lease had terminated before such rent and taxes accrued. Tenant holding over thereby renews his tenancy only when he holds over with *consent* of the landlord; and *Gilman*, having refused his consent, cannot now claim that plaintiff is in as his tenant. *Birch v. Wright*, 1 D. & E., 378; *Featherstonhaugh ads. Bradshaw*, 1 Wend., 134; *Lloyd v. Hough*, 1 How., U. S., 153, 159.

3. That the supplemental answer contained no averment of insolvency of the plaintiff, nor of any other special matter which could justify the entangling of this suit with the litigation between *Gilman* and the other defendants. *Hiner v. Newton*, 30 Wis., 640; *Noonan v. Orton*, 21 id., 283.

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4. That the only question not adjudicated by the former appeal was the value of the improvements. *Reed v. Jones*, 15 Wis., 40.

J. J. Orton, for the defendant *B. B. Hopkins*, argued,

1. That this court, on the former appeal, sent the cause back simply for a determination of the amount due plaintiff for his improvements, and with a direction to the court below that he be permitted to retain possession until that amount was paid; and that the circuit court properly followed this direction.

2. That *Gilman*, not consenting to plaintiff's holding over, could not, by his *laches* in respect to the payment of the amount due plaintiff, create any new *contract* relation between himself and plaintiff, while the latter retained possession of the premises, in accordance with the judgment of this court, as security for that amount. *Van Rensselaer v. Penniman*, 6 Wend., 569; *Holeman v. Abrams*, 2 Duer, 435; 2 B. & C., 147, note; R. S., sec. 2187.

3. That as plaintiff was not liable for rents or taxes, there was no ground upon which *B. B.* and *E. C. Hopkins* could properly be made parties to this action; that their rights as against *Gilman* were entirely independent of plaintiff's right to recover the value of his improvements, and the former question ought not to be litigated at plaintiff's expense; and that new defendants can be brought in by order of the court, on the first defendant's petition, only when their presence is necessary to a complete determination of the controversy, or when they have some interest to be protected therein. 1 Van Santv. Pl., 123, 132, 150, 151, 155, 672; R. S., secs. 2610-11, 2834.

4. That the respective rights of the several defendants as affected by the tax deed to *B. B. Hopkins* had been determined in an action by *B. B.* against *Otis B. Hopkins*; and that *Gilman* was bound by the judgment in that action.¹

¹ It has not seemed best to set forth here the grounds of this contention.—
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COLE, J. It could hardly have been anticipated, when this case was here on a former appeal (22 Wis., 476), that a decade would elapse before the cause would be brought to a hearing on the issues sent down from this court for trial; and, as both parties are more or less responsible for this delay, their obligations and duties in the mean time cannot be ignored in the final decision of the cause. The only relief which this court thought could be consistently granted on the former appeal, was to send the case back with directions to the circuit court to ascertain the value of the improvements placed upon the property by the plaintiff or his assignor, and to allow the plaintiff to retain possession of the premises until he was paid for such improvements.

This was as far as the court was called upon to go at that time. In conformity with this direction, the cause came on for hearing in June, 1878, and considerable testimony was taken on both sides, bearing upon the question of the value of the improvements placed upon the lot under the lease. At the outset here a question is raised as to the proper basis of estimating the improvements. One of the counsel for the defendant claims that under the covenants of the lease the lessor was bound to pay only for such improvements as, between landlord and tenant, could be removed or were capable of removal. This position is founded upon the clause in the lease which gives the lessor a lien for the rents and taxes on all the improvements which should be made upon the premises, and authorizes the lessor, in case of default on the part of the lessee, to sell the improvements at public auction, and give the purchaser a good and sufficient bill of sale or conveyance of such improvements. This construction of the lease we deem quite too narrow and strict. When the lease was executed, the lot was vacant and unimproved. It was doubtless contemplated by both parties at the time that a dwelling-house and other necessary erections and additions should be placed upon the property, such as would enhance its value

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and render it fit for the occupation of the tenant. Therefore, a cistern, well, barn, and other out-houses, placed upon the lot, would be deemed improvements within the meaning of the lease, though they could not all be detached or removed from the premises.

Considering the whole lease, we have no doubt that such erections or additions to the premises, which were calculated to enhance their value and render them desirable as residence property, were improvements within the covenants of the lease. The lease provides, in case the lessee made any improvements on the premises, and the lessor should elect, at the expiration of the term, to pay for them instead of renewing the lease, then that the improvements should be appraised "without regard to the situation or value of the premises leased." The counsel for the plaintiff argues with considerable force and plausibility, that this covenant imports an undertaking on the part of the lessor to pay what the improvements were worth to the tenant, irrespective of their connection with the land (and not what they were worth to the landlord), and without regard to how much they added to the value of the lot. But we think the proper basis is to ascertain the real value of the improvements, or what they are actually worth in their present condition, treating the property as residence property. Of course, if the premises were to be used for business purposes, some of the improvements might be unnecessary and add nothing to the value of the lot. But whatever was built or placed upon the premises which was a substantial benefit to them — whatever rendered them more fit for use as residence property, or more capable of producing an income or rent, — should be paid for at its present cost or actual value.

Now, as we understand the case, the court below proceeded really upon that basis in ascertaining the value of the improvements which the defendant was bound to pay for by the lease. The court assessed such value at the sum of \$5,700. It is

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claimed that the valuation is excessive, and unwarranted by the testimony. The evidence in regard to the value of the improvements is quite conflicting. While we have carefully considered it, as we find it in the printed case, we are not disposed to disturb the finding of the court below upon that branch of the case. The witnesses differ very widely as to the value of the buildings and structures put upon the premises; but the court below seems to have adopted neither the highest nor the lowest estimates. It would serve no useful purpose to discuss at length the testimony relating to this question of value, and we shall therefore dismiss the matter upon stating our conclusion upon it. We think substantial justice is done by the assessment or valuation made by the circuit court.

The court below further allowed interest on the value of the improvements as assessed, from the 15th day of April, 1869, to the rendition of the judgment. The *remittitur* from this court was filed in the court below April 15, 1868. Probably the circuit court considered that a year afforded ample time and opportunity for the defendant to ascertain and pay the value of the improvements. But the counsel for the defendant insists that as the plaintiff's intestate remained in the possession of the premises, enjoying the use of the improvements, it is inequitable to make the defendant pay interest on their value during such period. Under the circumstances we are disposed to treat the plaintiff like a mortgagee in possession after condition broken, liable for the rent and the payment of the taxes stipulated for in the lease, but that he is not entitled to interest on the value of his improvements.

On the former appeal, as already observed, this court thought the plaintiff had the equitable right to remain in possession until the defendant made payment for the improvements. It was suggested on the argument that this was not a right springing from the lease, but that the plaintiff retained possession solely by virtue of the decree of this court, without refer-

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ence to that instrument. Therefore, it is said, the plaintiff was under no obligation, while thus in possession, to pay any rent or taxes, but was absolutely discharged therefrom. This view, we think, is not warranted by the former decision. The court did not then attempt or assume to keep the plaintiff in possession independent of and without any reference to the terms of the lease. But this court then thought, and still thinks, that the plaintiff had the right, by virtue of the conditions in the lease, to remain in possession until the improvements were ascertained and paid for, inasmuch as the defendant refused to renew. But this was a right founded upon the stipulations in the lease, which a court of equity would enforce for the protection of the plaintiff.

It appears to us it would be a most extraordinary claim for a court of equity to sanction, to allow the plaintiff to remain in possession, enjoy the use of the improvements, have interest upon their value as ascertained by the court, but still pay no rent or taxes. A claim so inequitable and unjust cannot receive our assent. It was said that a party is not liable for use and occupation except where the relation of landlord and tenant actually exists, and that this relation arises only upon contract express or implied. But, without refining upon the matter, we reply that a court of equity, having acquired jurisdiction of a cause, will, if possible, do complete justice between the parties. That it is just and equitable, in adjusting the rights of the parties in this case, to charge the plaintiff with rent, as though holding over after the expiration of the term, and also to require him to pay taxes, according to the lease, is to our minds a proposition too plain for argument.

In July, 1876, the defendant *Gilman* made application to the circuit court for leave to file a supplemental answer, and for an order bringing in *Bedford B.* and *Edward C. Hopkins* as parties defendant. Leave was granted, and these persons were brought in, and the supplemental answer was served upon them. The supplemental answer is in the nature of a

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cross complaint, as respects these defendants, and seems to have been so treated by them in their respective answers. It states, in brief, that the plaintiff, *Otis B. Hopkins*, has remained in possession of the premises, but has paid no rent since May, 1865; that he has failed and neglected to pay the taxes and assessments levied upon the lot for the year 1869, and for several subsequent years; that, as a consequence, the lot, or an undivided portion thereof, has been sold for the delinquent taxes; that there are a number of tax certificates now outstanding and unredeemed; that the defendants *Bedford B.* and *Edward C. Hopkins*, for the purpose of creating a cloud upon the title, and to hinder and embarrass him in the enforcement of his rights against the plaintiff, and thereby injure him, have procured and placed upon record two tax deeds, issued upon tax certificates, which tax deeds, he alleges, they hold merely in trust and for the benefit of the plaintiff. He asks that the plaintiff account for the rent from the first day of May, 1865, with interest; that he be required to redeem the lot from the tax sales, or to account to him for the amount of such sales, with the statutory interest; that the plaintiff procure from *Bedford B.* and *Edward C. Hopkins* good and valid deeds of release of their interest in the property by virtue of the tax deeds; and that such deeds be adjudged fraudulent and void as against him.

Now the question is, Was not the defendant *Gilman* entitled to that relief upon the pleadings and testimony? We are of the opinion that he was, except that he should have no interest on the rent due and payable by the lease. A question was made as to the regularity of the practice in thus bringing in new parties defendant at that stage in the cause. We can see no substantial objection to the course pursued. Furthermore, both *Bedford B.* and *Edward C. Hopkins* appeared and answered the supplemental answer, and submitted proofs on the issues made therein without objection. These parties claimed adverse interests in the property; and it manifestly

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would be unjust to require the defendant *Gilman* to pay the plaintiff for improvements put upon the lot, when both such improvements and the lot itself had been lost in consequence of the neglect of the latter to pay the taxes which he was under obligation to pay. Indeed, we do not see how it was possible, under the circumstances, to settle the equities existing between the original parties without bringing in *Bedford B.* and *E. C. Hopkins*, representing conflicting claims. See *The Northwestern Mut. Life Ins. Co. v. Park Hotel Co.*, 37 Wis., 125; *Hunter v. Bosworth*, 43 Wis., 583.

No time will be spent in attempting to show that it was the plain duty of the plaintiff's intestate to pay all taxes and assessments levied upon the lot while he was in possession. This he was bound to do, as well on account of his relation to the property as by covenants in the lease; and it is quite apparent that if he could not himself take a tax deed upon the property and hold it as against his landlord, he could not procure it to be done by others for his benefit. We are quite well satisfied by the evidence that the tax deeds taken by his brothers were really for his use and benefit. All the facts of the case relating to the tax titles point irresistibly to that conclusion; but we shall not discuss the evidence upon that point. We attach no importance to the pretended adjudication in respect to one of these tax deeds in the case of *B. B. Hopkins v. Otis B. Hopkins*. Instead of dismissing the suit as to the defendants *Bedford B.* and *Edward C. Hopkins*, the judgment should have been as to them that the two tax deeds mentioned in the case were cancelled of record, as having been taken by them for the purpose of aiding their brother *Otis B.* to obtain some undue advantage in this litigation. We have said all that we deem it necessary to say as to the liability of the plaintiff for rent from May 1, 1865, and his duty to discharge all tax liens against the property.

By the Court.—The judgment of the circuit court is reversed, and the cause remanded for a restatement of the account

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between the plaintiff and the defendant *Gilman*, according to this opinion, and for an order adjudging the tax deeds to be cancelled.

RYAN, C. J., took no part in this cause.

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FORECLOSURE SALE: NOTICE. (1) *Publication of notice.* (2) *Presumption as to time of first publication.* (3) *Date of the notice itself.* (4) *Effect of revised statutes upon notice based on a previous judgment.* (5) *"Posting" of notice required in cities.*

1. Under secs. 3162-9, R. S., a foreclosure sale of land is not regular unless, prior thereto, the notice of sale has been published for six full weeks after the expiration of one year from the date of the judgment.
2. In the absence of proof to the contrary, it will be *presumed* that publication of a notice of sale, made in a daily newspaper, was first made on the day of the *date* of such notice; and certain statements in the sheriff's certificate and printer's affidavit in this case are *held* not to rebut this presumption.
3. Where the published notice of sale is *dated* before the expiration of the year, there is at least an *apparent* irregularity in the proceedings, tending to defendant's injury; but whether, upon clear proof of *publication* of the notice at and for the time prescribed by statute, such apparent irregularity would be fatal to the sale, is not here determined.
4. Where the revision of 1878 took effect between the rendition of a foreclosure judgment and the time for giving the notice of sale, the provisions of such revision governed as to such notice (R. S., sec. 4980); and, where the judgment merely directed that it should be given "according to law and the practice of the court," a notice not given in conformity to secs. 3168 and 2993, R. S., was irregular.
5. The provision of sec. 2993, R. S., that a notice shall be posted in "three public places in the *town*," etc., *held* applicable to *cities*. Subd. 17, sec. 4971, R. S.

APPEAL from the Circuit Court for *Milwaukee* County.
The case is thus stated by Mr. Justice TAYLOR:

"Action to foreclose a mortgage. The defendant *O'Neil*

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brings a separate appeal from the order confirming the sale made under the judgment. The record shows that final judgment in the action was rendered on the 9th of November, 1877, and that the sale under the judgment took place on the 21st of December, 1878. The sheriff's notice of sale as published bears date November 6, 1878.

"The sheriff, in his report of sale, says 'that previous to said day of sale I caused notice thereof to be publicly advertised for six weeks successively, as follows, to wit: by causing a copy of such notice to be printed once in each week, during six weeks immediately preceding said sale, in the *Milwaukee Daily Sentinel*,' etc.

"The foreman of the *Milwaukee Daily Sentinel*, in his affidavit of the publication of the notice, says 'that a notice of sale, of which a printed copy is hereto annexed, has been published in said newspaper once in each week for six weeks successively next before the day of sale mentioned therein.' The copy of the notice attached to the affidavit of said foreman bears date November 6, 1878.

"The order of confirmation of sale was duly excepted to by the appellant *O'Neil*, and he alleged that the sale was irregular and void: *first*, for the reason that it appears on the face of the proceedings that one year from the date of the judgment had not expired before the sheriff proceeded to advertise the mortgaged premises for sale; and *second*, because the sale was in fact made before the expiration of six weeks after the expiration of one year from the date of said judgment."

For the appellant, there was a brief by *John A. Wall*, his attorney, with *Samuel Howard*, of counsel, and oral argument by *Mr. Howard*.

For the respondent, there was a brief by *Joshua Stark* and *D. G. Rogers*, and oral argument by *Mr. Stark*.

TAYLOR, J. In the case of *Life Ins. Co. v. Neeves*, 46 Wis., 147, this court decided that under chapter 143, Laws of

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1877 (now sections 3162 to 3169, inclusive, R. S. 1878), no step can be taken for the sale of mortgaged premises after judgment until the expiration of one year from the date of the judgment, and that the term "sale," as used in said statute, was intended to embrace everything appertaining to the sale, including the publication of the notice of sale; but that any irregularity in this respect would be waived, unless an appeal was taken from the order confirming such sale.

Without discussing the question whether one year from the date of the judgment expired on the eighth day of November, 1878, so that a publication of the notice of sale would be good if made on the ninth of November, 1878, we do not think the proof, either by the sheriff's return or the affidavit of the foreman of the *Sentinel*, shows that it was published on the ninth day of November, 1878. In order to make the sale regular, it must have been published on that particular day or the publication would be insufficient. If made on any day earlier than the ninth of November, 1878, it would be too early, under the decision of this court above cited; and if made on any day later than that day, the notice would be short, or less than six weeks before the day of sale, and therefore void under the decision of this court in the case of *Eaton v. Lyman*, 33 Wis., 34. There is no clear proof that the first publication was made on the ninth day of November, 1878; and, the notice bearing date on the sixth, and, having been published in a daily paper, in the absence of proof to the contrary, it will be presumed that it was published on the sixth, especially as such presumption is not in conflict with either the sheriff's certificate or the affidavit of the printer.

The statements that the notice was published for six weeks, once in each week, next before the sale, or once in each week during six weeks immediately preceding said sale, might both be true and yet the first publication have been made on the sixth of November, dependent upon the meaning of the word "week." If the word "week," as used in said statements, has

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its usual and ordinary meaning — a period of time commencing with the first day of the week, Sunday, and ending with the last day, Saturday,— then the publication of the notice on the sixth of November, which was Wednesday, and on each succeeding Wednesday preceding the sale, would make six publications, the last one being Wednesday, the eleventh of December, and the week in which that Wednesday is found would end on the fourteenth — just one week before the sale. If the notice had been published, as is claimed, on the ninth, which was Saturday, and every succeeding Saturday, still the last publication would be just one week before the sale, viz., the fourteenth of December, and not within or during the week in which the sale was in fact made; and in neither case would the publication have been during the six weeks next before the sale, counting the weeks back from the day of the sale, except upon the construction of the word week as having its ordinary meaning, and that the first publication took place in the week which ended on Saturday, the ninth of November, 1878; and, in such case, the statements would be equally true whether the first publication was on the sixth or ninth of the month, both dates being within the same week.

But, whatever construction might be given to these statements, we are of opinion that the notice itself, on its face, shows that the sheriff was taking proceedings to sell the mortgaged property before he had any authority to do so, under the statute and the construction given thereto by this court. He made out his notice of sale before the year from the date of the judgment had expired, and persons understanding the law applicable to such sales would be likely to be misled by such notice, and deterred from bidding at the same. Upon the face of the proceedings they were irregular, and such irregularity tended to the prejudice of the defendants; and whether or not such apparent irregularity would be fatal to the proceeding in a case where the evidence clearly showed that, notwithstanding such apparent irregularity, the notice of sale was in fact

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published at and for the time required by law, we hold that in this case, where there is no such proof, the apparent irregularity is fatal to the proceeding.

There is another irregularity in the notice of sale in this case, which is equally fatal to it, and which undoubtedly arose out of the change of the law by the then recent enactment of the R. S. of 1878, sec. 3168. By the provisions of that section, notice of a mortgage sale must be given in the same manner provided by law for the sale of real estate upon execution, or in such other manner as the court shall in the judgment direct. The judgment in this case does not direct how the notice of sale shall be given, except that "it shall be given according to law and the practice of this court." It is true, this judgment was rendered before the revised statutes of 1878 took effect, but the time for giving notice of the sale did not arrive until after they took effect. Section 4978, R. S. 1878, repealed chapter 299, Laws of 1863, which prescribed the manner of giving notice of sale upon judgments of foreclosure; and section 4980, R. S. 1878, provides that subsequent proceedings in actions pending at the time the revised statutes of 1878 took effect, shall conform to the provisions of the revised statutes of 1878 when applicable.

The provisions of these statutes were clearly applicable to the sale in this case, and the notice of sale should have been given as required by said section 3168. The notice of sale required to be given by that section is prescribed in section 2993, and requires that, in addition to the publication of the notice in a newspaper, such notice shall be fastened up in three public places in the town where such real estate shall be sold; and if the sale be in a town different from that in which the premises to be sold are situated, then such notices shall be fastened up in three public places in the town in which the premises are situated, six weeks previous to the sale. There can be no doubt but this provision is applicable to cities, although the word *town* only is used in the section. See subdivision 17 of section 4971, R. S. 1878.

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The sheriff's report of sale clearly negatives the presumption that any notices of the sale were posted as prescribed by law, and the sale was therefore irregular for that reason. The fact that this irregularity was not suggested by the counsel for the appellant is, perhaps, evidence that the change made in the law has not attracted the notice of the profession generally, and fully justifies this court in calling attention to the fact in order to prevent any misapprehension in regard to it in the future.

By the Court. — The order of the circuit court confirming the sale is reversed.

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APPEAL TO SUPREME COURT. *Determination of cross appeals. Reversal on appeal of one defendant. Premature motion.*

1. When separate appeals in the same case are pending here, this court will look into the whole record for the purpose of disposing of them.
2. Where an order confirming a foreclosure sale is reversed on the appeal of one defendant, for irregularities in the sale, or on any grounds affecting equally all the defendants, it will be reversed as to all.
3. On appeal taken at the same time, by another defendant, from a further order in the same cause, denying his motion, made and decided *previous* to any order confirming the sale, that plaintiff be restrained from collecting any part of the deficiency upon the judgment after applying to it the proceeds of the sale: *Held*, that the order must be affirmed on the ground that the motion was *premature*, but without prejudice to appellant's right to renew the motion.

APPEAL from the Circuit Court for *Milwaukee* County.

Foreclosure of a mortgage, against O'Neil, *Larkin* and others. *Larkin* appealed from an order after the sale, but before confirmation thereof. The nature of that motion will appear from the opinion.

For the appellant, there was a brief by *John A. Wall*, with *Samuel Howard*, of counsel, and oral argument by *Mr. Howard*.

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For the respondent, there was a brief by *Joshua Stark* and *D. G. Rogers*, and oral argument by *Mr. Stark*.

TAYLOR, J. This is an appeal from an order made in the same action in which the defendant Thomas O'Neil appealed from the order confirming the sale made therein, and upon which appeal this court has reversed such order for the reason stated in the opinion filed in that case. *Larkin*, the appellant in this case, made a motion in the court below to restrain the plaintiff from proceeding to collect any part of the deficiency upon the judgment after the application of the proceeds of the sale to the satisfaction thereof, for reasons set forth in his motion. The circuit court denied his motion, and he appeals from the order denying the same. Without passing upon the merits of the appellant's motion, we have come to the conclusion that the order of the court below should be affirmed for the reason that this motion was unnecessary and premature. The order confirming the sale is reversed by this court upon the appeal of O'Neil, upon grounds which apply as well to the appellant in this case as to O'Neil. Although none of the defendants except O'Neil appeal from the order of confirmation, and it might therefore be inferred that the other defendants are satisfied to have the sale stand, still, this court having decided that the sale was irregular and void upon grounds which apply with equal force to all the defendants, we were constrained to reverse such order as to all. It would seem to involve an absurdity to do otherwise. We do not see how the court below could, upon the objection of O'Neil, have refused to confirm the sale as to him, and yet have confirmed it as to the other defendants.

It is possible that there might be such a state of facts presented by one defendant, upon a motion to confirm a mortgage sale, as would justify the court in refusing a confirmation as to such defendant, and yet confirm the same as to other defendants not appearing to oppose; but the case of O'Neil did

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not present such a state of facts. In reversing the order, therefore, upon the appeal of O'Neil, we did as the court below would have been compelled to do, had it considered the objection of O'Neil fatal to the sale — refused a confirmation as to all the defendants.

That the refusal to confirm a sale in an action of foreclosure, upon the objection of any party thereto, on grounds which go to the regularity of the sale, should refuse it to all parties interested and direct a new sale, is evident when we consider the effect of such an order upon the purchasers at such irregular sale. In case of a refusal of the court to confirm the sale, it is clear that the purchaser could not be compelled to complete his purchase by the payment of the purchase price; and if he had paid it before the order was applied for, he could recover it back if the sale were not confirmed as to all the parties interested in the premises. This court has lately held, in the case of *Woehler v. Endter*, 46 Wis., 301, that the purchaser is not entitled to the possession of the mortgaged premises until the sale is confirmed. It would seem to follow that a purchaser would not be compelled to pay the purchase price in case the court refuses a confirmation upon grounds which go to the regularity of the sale.

The rule of common law was, that an entire judgment rendered against several defendants could not be reversed as to one defendant and suffered to stand as to the others. Bac. Abr., "Error (M.)," and cases cited; *Richards v. Walton*, 12 Johns., 434; *Arnold v. Sandford*, 14 Johns., 417; *Geraud v. Stagg*, 10 How. Pr., 369; *Sheldon v. Quinlen*, 5 Hill, 442. This rule has been changed in this state by statute. Section 3071, R. S. 1878, provides that, "upon an appeal from a judgment or order, or upon a writ of error, the supreme court may reverse, affirm or modify the judgment or order, and as to any or all the parties." This is substantially the law in New York, and the courts of that state have held that, upon an appeal by one defendant from a judgment in a case where a sepa-

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rate judgment might have been entered against either of the defendants, it is the duty of the court, in case error has been committed to the prejudice of the appellant, to reverse the judgment only as to the defendant appealing. *Geraud v. Stagg*, 10 How. Pr., 369; *S. C.* in 4 E. D. Smith, 27; *Van Slyck v. Snell*, 6 Lansing, 299; *Story v. Railroad Co.*, 6 N. Y., 86; *Campbell v. Perkins*, 8 N. Y., 430. Similar decisions have been made by this court. *Williams v. Starr*, 5 Wis., 534; *Palmer v. Yager*, 20 Wis., 91; *Cairns v. O'Bleness*, 40 Wis., 469. None of these cases hold that it is the duty of the appellate court to reverse only as to the party appealing, when the judgment is rendered against them in an action where no separate judgment could have been properly rendered in the court below against the defendants not appealing; and the New York cases clearly indicate that in such cases if the judgment be reversed as to one it should be reversed as to all, whether they have appealed or not. It is probable that under our statute this court would have the right in its discretion to do either; but where, as in the appeal of O'Neil, the appeal is from an order of confirmation of sale upon a judgment of foreclosure, and this court reverses the same for errors which affect the regularity of the sale itself, the reversal as to one ought to reverse as to all, as the irregularity affects all equally, and great inconvenience would arise if it were held that the sale should stand as to some of the defendants and not as to others.

We also hold that when separate appeals taken in the same case are pending in this court, we will look into the whole record for the purpose of disposing of such appeals. By an examination of the record upon these appeals, we find upon the appeal taken by the defendant O'Neil, that the sale was irregular and must be set aside. The sale being set aside, it is premature to pass upon the questions presented on the motion of the defendant *Larkin*. Upon another sale the mortgaged premises may sell for enough to satisfy the whole

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mortgage debt, and in such case the defendant *Larkin* will have nothing to complain of, and no relief to ask from the court.

We think the court below should not have entertained the application of the appellant for the relief asked, until the sale of the mortgaged premises had been regularly made and confirmed. Until that is done, it cannot be ascertained whether there will be any judgment for a deficiency against the appellant, and he is not in a position to ask the relief prayed for until it so appears.

The record discloses that the appellant's motion was made, heard and decided before any order of confirmation was made in the case, and that the appeals in this case and in the O'Neil case were perfected on the same day. We think the appellant's application for the relief asked should not have been entertained by the court below until the sale was confirmed; and then, if an appeal were taken from the order confirming such sale, the hearing of this appellant's application should have been delayed until the determination of such appeal.

Under these circumstances, the motion of the appellant *Larkin* was properly denied by the court below, on the ground that it was prematurely made; and upon that ground this court affirms the order, but without prejudice to the appellant to renew the same at the proper time, if any deficiency shall remain after sale and confirmation.

By the Court.—The order of the circuit court is affirmed.

THOMPSON VS. HERMANN and others.

MASTER AND SERVANT. *Liability of owners and master of ship for injuries to seaman, from negligence, etc.*

1. It is a general rule, applicable to all kinds of service, that a master who negligently fails to furnish his servant with safe machinery, means and appliances for doing the work required to be done, is liable for injuries to the servant caused by such negligence.

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2. The common seaman in a vessel at sea is bound to submit to the judgment and discretion of the master, and obey his orders, in the management of the vessel and its repairs, especially in rough weather and cases of emergency; and the fact that the seaman, on receiving from the master an order otherwise lawful, and being imperatively commanded to perform it in a manner or by means which he regards as unnecessarily dangerous, does not refuse to so perform it, or undertake then and there to withdraw from the service, will not prevent his recovering for personal injuries caused by the master's fault.
3. The owners of a vessel, as well as the master, are liable for injuries caused by the negligence or unskilfulness of the master, provided the act be done within the scope of his authority as such.

APPEAL from the County Court of *Milwaukee* County.

The averments of the complaint, as amended, are thus stated by Mr. Justice ORTON:

"The complaint charges, in effect, that the defendants are the owners, and one of them master, and the plaintiff a seaman, of the vessel "Surprise," sailing on Lake Erie, between the ports of Ashtabula and Erie; that while a heavy sea was running, and the vessel was pitching and rolling heavily, the jaw rope of the main gaff parted, and the gaff was unshipped, launched forward in front of the main mast, and swung over into the main rigging, and that the plaintiff, with other seamen, was ordered by the master to adjust the gaff, by standing upon the lower boom, and pulling upon the bow-line fastened to one of the horns of the jaw of the gaff, and which was very likely and apt to slip from said horn, which was very smooth, worn and slippery, and cause plaintiff to fall from said boom to the deck below, and be thereby injured, all of which was well known to the master; that the plaintiff, thinking it unsafe and dangerous to obey such order, objected and protested against the same, and informed the master, and insisted, that the main gaff could as well be adjusted by means of tackle then and there near at hand, and with safety to all concerned; but that the master refused to adopt such precautionary means, and imperatively ordered the work to be done in the danger-

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ous way above stated; and that, in the careful discharge of his duty in obedience to such order, the plaintiff fell from said boom, and was injured, by reason of the slipping of the bowline; and that the master was grossly negligent in not providing, adopting and using the safe and proper means and appliances for such work, and in ordering and directing it to be done in the dangerous manner above stated."

A demurrer to the complaint, as not stating a cause of action, was sustained; and plaintiff appealed from the order:

For the appellant, there was a brief by *Markhams & Smith*, and oral argument by *E. P. Smith*:

1. To the point that a master who by any act or omission unnecessarily enhances the usual risks of the employment, is liable for injuries thereby resulting to the servant, counsel cited Wood's M. & S., §§ 345, 348; 4 Wait's Act. & Def., 417; *Coombs v. New Bedf. Cord. Co.*, 102 Masa., 572; *C. & N. W. Ry Co. v. Jackson*, 55 Ill., 492; *Columbus & Ind. Ry Co. v. Arnold*, 31 Ind., 175; *Keegan v. Kavanaugh*, 62 Mo., 230; *Strahlendorf v. Rosenthal*, 30 Wis., 674; *Smith v. Railway Co.*, 42 id., 525-6; *Wedgwood v. Railway Co.*, 44 id., 44; *Bessex v. Railway Co.*, 45 id., 477. 2. To the point that plaintiff's act in obeying the order, instead of refusing to do so and renouncing the employment, would not prevent a recovery, they cited Cooley on Torts, 555-6, 559-60; Smith's M. & S., 121; 4 Wait's Act. & Def., 401; Curtis's Rights & Dut. of Mer. Seamen, 33, 93, 134; Desty's Ship. & Adm., § 180; Dixon on Ship., 79; Wood's M. & S., § 387; Abbott on Ship., 173; *Collins v. Evans*, 5 Q. B., 830; *Atkins v. Johnson*, 43 Vt., 78; *Paterson v. Wallace*, 1 Macq., 748; *S. C.*, 28 Eng. Law & Eq., 48; *Patterson v. Railroad Co.*, 76 Pa. St., 389; *Indermaur v. Dames*, L. R., 1 C. P., 274; *C. & N. W. Railway Co. v. Bayfield*, 37 Mich., 211; *Grizzle v. Frost*, 3 F. & F., 622; *Coombs v. N. B. Cord. Co.*, *supra*; *Bartonskill Coal Co. v. McGuire*, 3 Macq., 300; *Fort v. Railroad Co.*, 2 Dill., 259; *S. C.*, 17 Wall., 553; *Fuller v. Colby*, 3 Woodb. &

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Min., 7; *Harden v. Gordon*, 2 Mason, 541; *Johnston v. Barque Cyane*, 1 Sawyer, 153; *Ulary v. Washington*, Crabbe, 204; *Butler v. McLellan*, 1 Ware, 220; *Schultz v. Railway Co.*, 44 Wis., 638. Mere knowledge of the danger on plaintiff's part is not conclusive of contributory negligence; but that question, under the circumstances, was for the jury. *Kelly v. Fond du Lac*, 31 Wis., 179; *Kenworthy v. Iron-ton*, 41 id., 647; Wood's M. & S., § 377.

For the respondent, there was a brief by *Ludwig & Somers*, and oral argument by *Mr. Somers*:

1. A servant cannot recover unless the employer knew or ought to have known of the defect which caused the injury, and the employee did not know of it or had not equal means of knowledge. *Malone v. Hawley*, 46 Cal., 409; *McGlynn v. Brodie*, 31 id., 376; *Baltimore, etc., Railroad Co. v. Woodward*, 41 Md., 268; 4 Wait's Act. & Def., 417-18; Cooley on Torts, 555; 2 Hilliard on Torts, 467. One who places himself unnecessarily in a position of known danger, cannot recover against the person whose negligence caused the danger. *Goldstein v. Railway Co.*, 46 Wis., 404; 1 Add. on Torts, 489, and cases there cited. 2. Plaintiff attributes the injury to the manner in which the work was to be done. It is well settled that an employer has a right to judge for himself how he will have his work done (not violating the law of the land); and workmen, with knowledge of the circumstances, must judge for themselves whether they will do the work required in that manner. Cooley on Torts, 552; 2 Hilliard on Torts, 468. Even if a safer mode of doing some particular work is discarded by the master's orders, the servant cannot maintain an action for injuries sustained. *Dynen v. Leach*, 40 Eng. L. & E., 491. A servant may decline any service in which he reasonably apprehends injury to himself (*Paterson v. Wallace*, 1 Macq., 748; *Buzzel v. Manuf'g Co.*, 48 Me., 113; 1 Add. on Torts, 488); and, being unfettered by any consideration but his own interests, if he incurs hazards which prove

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injurious, he cannot in law complain. *Moss v. Johnson*, 22 Ill., 633.

ORTON, J. We think the amended complaint in this action states a cause of action, and that the demurrer should have been overruled.

It is objected by the learned counsel of respondent, that the facts stated show that the service necessarily required by the employment was dangerous, and that the plaintiff, by entering upon it, took the risks and hazards upon himself, and that he was not bound to obey orders requiring such service, and might have declined the service, and abandoned the employment, and was negligent in not so doing.

We think that the peculiar character of the employment, and the relations existing between the master and the common seaman of a merchant vessel outside of port, remove this case from these objections and the authorities cited to sustain them; and that, although they might be correct legal propositions in respect to other kinds of employment, they have scarcely any application here. There would seem to be, however, one principle, applicable to all kinds of service, upon which this complaint might be sustained, irrespective of the peculiar character of this employment and the relations of the parties; and that is, that the master is bound to furnish safe machinery, means and appliances for the work required to be done, and that carelessness or negligence in these respects alone may be legal ground for recovery. *Smith v. The C., M. & St. P. R'y Co.*, 42 Wis., 525; *Wedgwood v. The C. & N. W. R'y Co.*, 44 Wis., 44, and many other cases in this court. But, aside from this principle, the master occupies such a position of authority on board of his vessel at sea, and the common seaman such a position of subordination, that the seaman is bound to submit to the will, judgment and discretion of the master, and obey his orders in the management of the vessel or for its repair, and especially in rough weather and in cases of emergency;

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and any other principle would work insubordination and the destruction of all authority and discipline on board the vessel.

If each seaman, when ordered to perform any work or duty in the management or repair of the vessel, were allowed by law to exercise his own free will, discretion and judgment in all cases of danger, and obey the master or refuse obedience at his pleasure, such a right would directly lead to general mutiny, and be fraught with great danger and peril, not only to the one so insubordinate, but to all on board, and to the ship and cargo as well. The language of the books is, that "disobedience or misconduct of the sailor is of necessity punishable with great severity, because discipline must be preserved, and without it the ship would always be in great peril." 1 Parsons on Maritime Law, 463. "By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relating to the management of the ship and the preservation of good order, and such obedience they expressly promise to yield to him by the agreement usually made for their service. . . . Such an authority is absolutely necessary to the safety of the ship and of the lives of the persons on board." Abbott on Shipping, 177. "A deliberate refusal to do duty has always been considered as one of the highest offenses by the maritime law. The power to command must reside somewhere, and the law has placed it in the master. He may exercise it properly, or *harshly* and *unjustly*, and for this he is answerable when he returns to port." *The Palledo*, 3 Ware, 321.

"The master has an absolute authority on board his ship, and his orders, if not unlawful, are and must be imperative; submission is amongst the first duties of the seaman." *United States v. Smith & Coombs*, 3 Wash. C. C., 525. "In cases of necessity or calamity during the voyage, the master is by law created agent for the benefit of all concerned, and his acts done under such circumstances, in the exercise of a sound

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discretion, are binding upon all parties in interest in the voyage." *Jordan v. Warren Ins. Co.*, 1 Story C. C., 343. While treating upon the authority of the master, in the case of "*The Almatia*," Deady's Rep., 478, the court says: "He had a right to have the sails furled to please his eye, and in accordance with his notions of what was *professional and seamanlike*. Some one must give the law upon these matters, and the general rule is that the seaman must obey what his master commands." The seaman on the voyage has no alternative but to obey or suffer punishment. He cannot dissent from or abandon the service on account of the dangers or unreasonableness of the particular service required, as he might do in port, but must obey at any risk or hazard to himself; and yet he voluntarily incurs no risk, but acts upon the risk and responsibility of those whose lawful authority demands of him implicit obedience to every lawful command, however unreasonable or dangerous, to which he reluctantly submits to his own personal injury. The law which imposes upon the master this almost absolute authority, also imposes upon him the fullest responsibility for its careful, considerate and reasonable exercise in all emergencies, and in default of which it also imposes upon him a clear legal liability — or upon those he represents — for any personal damages occasioned by such default.

The plaintiff, by protesting against the dangerous and unreasonable manner of accomplishing the object proposed, and by which he was injured, and suggesting a safer and more reasonable way of accomplishing the same object, and then submitting to the order and authority of the master, and attempting to do the work required in a careful and prudent manner, did his whole duty, and thereby removed from himself all of the responsibility. The master, by declining and rejecting the safer and reasonable manner proposed by the plaintiff, and by gross carelessness imperatively commanding the plaintiff to perform the work in the more dangerous way,

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assumed all of the responsibility and risk for the defendants. The plaintiff entered upon this dangerous service under duress and submission to compulsion, without the liberty of choice or freedom of the will, and is therefore not responsible for his acts, without negligence. "Cases may and do arise when instant obedience to the orders of the mate is necessary; such as orders to take in sail in a sudden squall, or to cut away the rigging or spars, or to go aloft on a sudden emergent duty, when the mate may instantly enforce obedience by the application of positive force, and indeed of all the force required to produce prompt obedience." Flanders on Shipping, § 73; *United States v. Hunt*, 2 Story C. C., 125; *United States v. Taylor*, 2 Sumner, 588.

The plaintiff avers that he used care, or was not in fault, in attempting with others to execute the orders of the master, and that he submitted to the judgment and authority of the master after protest, and thus most clearly brings himself within the protection of these principles, and establishes his right of recovery. He could not have safely or lawfully done otherwise than submit under the circumstances; for his disobedience would have been revolt and mutiny, and he would have been liable to personal hazard and punishment; and to hold, under such circumstances, that he cannot recover for his personal injuries, received without any fault of his own, and solely by the careless and unreasonable orders of his superior, would be outrageously unjust.

The owners of the vessel, for whom the master was acting *pro hac vice*, are liable for the injuries of the plaintiff caused by the want of skill and ordinary care in commanding such dangerous and unreasonable service. "By the general rule of the maritime law, the owners of a vessel are liable for all injuries caused by the misconduct, negligence or unskillfulness of the master, provided the act be done within the scope of his authority as master." Beawes' *Lex Mercatoria* (4th London

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ed.), 54; *Stinson v. Wyman*, Daveis, 172; *The Waldo*, id., 161; *Dusar v. Murgatroyd*, 1 Wash. C. C., 13.

In the case of "*The State Rights*," Crabbe, 22-24, Mr. Justice HOPKINSON uses the following language, which is so comprehensive and expressive of the principles governing this case, that a copious quotation will be warranted: "In the case now before this court, I do not understand it to be denied that the owners of a vessel are answerable for the acts of their captain done within the course and scope of his employment and business. Is this not enough for this case? Assuredly it was within the course and scope of the employment and authority of Captain Allen, to direct the 'State Rights' to be steered at his pleasure. He had full power to do this, derived from his owners, and all on board were bound to obey his orders without interposing their judgment as to the consequences to him or his owners. By the execution of such an order a wrong is done to another party. On what principles of the common or maritime law can the owners of the offending vessel, the principals of such an agent, whom they have armed with the power to do the wrong, throw the responsibility from themselves?"

These principles are further sustained by *Desty's Shipping and Admiralty*, 124; *Niagara v. Cordes*, 21 How., 7; *Stone v. Ketland*, 1 Wash. C. C., 142; *The Ben Flint*, 1 Abbott, U. S., 126; *Reed et al. v. Canfield*, 1 Sumner, 195; *Brown v. Overton*, Sprague, 462; *Brown v. The D. S. Cage and Owners*, 1 Woods, 401. This treatment of the subject of the liability of the owners for the tortious acts of the master of a vessel has been more extended because I have been unable to find any reported case of closely analogous facts.

By the Court.—The order of the county court sustaining the demurrer to the amended complaint is reversed, with costs, and the cause remanded for further proceedings according to law.

Budge vs. Mott and another.

BUDGE vs. MOTT and another.

SHIPPING. *What act of master inconsistent with his employment.*

1. Where a vessel was arrested by process in admiralty issued at the suit of the master and another person, and her voyage and employment interrupted until she was released by her owners: *Held*, that this act of the master terminated his employment as such, at the election of the owners.
2. The master, having been made one of the libellants of his own vessel, and, with knowledge of the fact, having done nothing towards dismissing the suit or releasing the vessel, cannot be heard to deny that he was a party to the proceeding, on the ground that he professed disapproval of it.

APPEAL from the Circuit Court for *Milwaukee* County.

In March, 1875, defendants, as owners of a vessel, employed the plaintiff, *George Budge*, to sail it as master on the great northern lakes, for the season of 1875, for a specified sum. Plaintiff served as such master until July 1, 1875, when defendants discharged him from their service. It appears that they paid him for his services until the date of his discharge, at the stipulated rate; but he sought in this action to recover the remainder of the sum agreed to be paid for the season; alleging, among other things, that he was discharged without fault on his part.

On this trial, defendants put in evidence a libel against the vessel, filed June 24, 1875, in a federal district court, which, after the signature of the proctors, purported also to be signed by the present plaintiff as well as by his brother, *Gilbert Budge*, with a verification attached signed by *Gilbert Budge*. The libel recites that "*Gilbert Budge* and *George Budge* exhibit this their libel;" avers that the libellants are sole owners of the vessel, and are deprived of the possession by means of certain fraudulent representations and certain proceedings therein set forth; and prays for a warrant of arrest against the vessel, and process of monition for *John T.*

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Mott (one of the present defendants), and all others concerned, etc. An undertaking for the costs, filed at the same time, and purporting to be signed by the present plaintiff as well as by Gilbert Budge and a third person, was also put in evidence. When the libel was exhibited, process was issued thereupon, and the marshal took possession of the vessel, which was released a few days afterward upon bond filed by the owners. The testimony for defendants also tended to show that the libel was filed with the knowledge and consent of the plaintiff; and that at the time of his discharge, the fact that he had united with Gilbert Budge in exhibiting such libel was assigned to him as the reason of such discharge.

Plaintiff introduced evidence to show, among other things, that the libel was filed without his approval or consent and against his remonstrances, and that he objected to it because he feared that it would lead to his discharge from defendants' service; and he testified that he never signed his name to the libel or undertaking, and did not know that it was so signed before the trial of the present action.

Under the direction of the court, the defendants had a verdict; and plaintiff appealed from the judgment.

For the appellant, there were briefs by *H. H. & G. C. Markham*, with *E. P. Smith*, of counsel, and oral argument by *Mr. Smith*. They contended that, upon the evidence in the case, the jury, if the questions of fact had been submitted to them, might have found that plaintiff never signed the libel, or assented to or approved of the filing of the same; that he did not know of its contents; that when his attention was called to it by defendant's agents, he assured such agent that he had nothing to do with it; and that defendants nevertheless, without inquiry into the fact, discharged him from their employment. Upon these facts plaintiff would have been entitled to a judgment in his favor. Plaintiff testifies that, though he requested one Capt. Vance to notify the owners of the filing of the libel, knowing from his brother that it was

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to be filed, yet he did not know the particular contents either of the libel itself or of the telegram sent. The only evidence, other than the testimony of defendant's agent, to show that plaintiff knew the contents of the libel, was the possession of the vessel by the marshal. No papers were served on plaintiff in the proceedings against the vessel, the law requiring simple publication; so that there was nothing in the fact of possession by the marshal that would necessarily notify plaintiff of the contents of the libel.

Wm. P. Lynde, for respondents:

The libel was filed by plaintiff's lawyers in the name of plaintiff and Gilbert Budge; the vessel was seized on a monition issued on that libel; plaintiff's name appears to be signed to the libel and also to the stipulation for costs; he caused a telegram to be sent by Capt. Vance to the owner stating that he and his bother had libeled the vessel; he told the agent, when the latter came on to release the vessel, that he had been overpersuaded by Gilbert; and he made no proposition to dismiss the suit as to himself, but allowed it to go on, compelling the owner to bond the vessel. Under such circumstances the owner was fully justified in discharging him from his employment. If the libel had been filed without plaintiff's knowledge or consent, still, when the vessel was seized and the monition was posted on the vessel, showing that she was seized in a suit brought by *George Budge* and Gilbert Budge, and when he dictated the telegram notifying his employer of the suit, he certainly did not know that his name was used as libellant; and if he did not intend to approve the snit, he should at once have disclaimed, and have had the libel dismissed as to himself. This was in his power at any time. *Noonan v. Orton*, 31 Wis., 272; *Lowenstein v. Gildenwell*, 7 Cent. L. J., 168.

RYAN, C. J. The position of master of a ship is one of great trust, power and responsibility. In all emergencies,

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physical and moral, it is his peremptory duty to protect, as far as it may lawfully be done, his vessel and the interest of his owners in it. Indeed, his power and duty go so far that he may, in some emergencies, pledge his vessel by bottomry, to secure or relieve her from arrest. In case of arrest, or threatened arrest, it is his duty to do all that he may properly do, on behalf of the vessel and her owners, to free her from arrest, so that she may prosecute her voyage or employment; and in the performance of these duties the master is held to a high degree of care and integrity. *Abbott's Shipping*, 167; *1 Parsons' Shipping*, 140; *2 id.*, 3; *The Aurora*, 1 *Wheat.*, 96; *Smith v. Gould*, 4 *Moore P. C.*, 21; *The Gauntlet*, 3 *W. Robinson*, 52.

Here the vessel, of which the appellant was master, was arrested by process in admiralty issued at the suit of himself and another, and her voyage or employment interrupted until she was released by her owners. It may be that the master and his complaint in admiralty had a valid claim against the vessel or her owners. It may be that the master was not designedly guilty of bad faith to his owners by suffering his name to be used in the proceeding to arrest the vessel. Of that it is unnecessary to express an opinion. But it is quite certain that, rightfully or wrongfully, the appellant took a course inconsistent with his employment and duties as master, stopping the employment of the vessel with which he was charged, and terminating his own employment as master at the election of his owners. He could not by his own act, in his own behalf, stop the navigation of the vessel, and at the same time be entitled to wages for navigating her. As far as it lay with him, he rescinded his contract of employment as master by putting it out of his own power to perform it.

It is idle to pretend that the appellant was not a party to the proceeding in admiralty against the vessel because he professed disapproval of the suit. The suit was brought in his name and his complaint's, and, being a party of record, he

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cannot be heard to say that he was not a party in fact. He was one of the libellants of his own vessel in admiralty, as he must have been fully advised, if he had no other notice, by the monition served upon him; and he did nothing towards dismissing the suit or releasing the vessel. Whatever differences of opinion or of policy in the matter there may have been between himself and his coplaintiff, his name was used as a plaintiff of record. He suffered his name to be so used, and he was responsible for the arrest and detention of his vessel in the suit in admiralty.

The view of the case taken by the learned judge of the court below was quite right, and the judgment below is affirmed.

By the Court. — Judgment affirmed.

SANGER and others vs. DUN and others.

CONTRACT. *Liability of "Collection Agency" for money collected through it.*

Defendants having a "mercantile agency" with a "collection department," in this state, plaintiffs left with them a claim, for collection, and took from them a receipt stating the amount of such claim and that it was to be transmitted by mail for collection or adjustment, to an attorney, at the risk and on account of the plaintiffs, and the proceeds to be paid over or accounted for to them when received by defendants from said attorney. Plaintiffs also signed a receipt in defendant's books, which stated the nature and amount of their said claim, and that the receipt first above mentioned had been given them, reciting its terms. *Held,*

1. That, in the absence of any proof of fraud in respect to them, these receipts fix the rights and liabilities of the parties in regard to said claim, even if accepted or subscribed by plaintiffs without reading them.
2. That, under such receipts, defendants were not liable for the acts or default of the attorney employed by them to collect the claim, unless they were guilty of gross negligence in the selection of such attorney.

LYON and TAYLOR, JJ., dissent as to the second point.

3. What the liability of defendants would have been in the absence of any express contract, not considered.

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APPEAL from the County Court of *Milwaukee* County.

On the 5th of September, 1874, plaintiffs, at the city of Milwaukee, put into defendants' hands, for collection, a claim, in the form of an account, against L. P. Rogers & Bros., of Foxburgh, Pa. Defendants forwarded the claim to an attorney at St. Petersburg, a village in the same county as Foxburgh, who collected the whole amount of the claim, but never paid over any part of it to either the defendants or the plaintiffs. This action was brought to recover the amount from defendants. The complaint alleges that at the time when such claim was put in their hands, defendants' business was "the collection of all kinds of debts in all parts of the United States;" that, at and before said date, they urged plaintiffs to place in their hands for collection accounts against persons residing in or out of this state, representing that they had extraordinary means and facilities for the speedy collection of claims against any person in any part of the United States, and assuring plaintiffs that all claims so placed in their hands should be promptly collected, and the proceeds promptly paid over; and that plaintiffs gave defendants, for collection, the claim in question, at their request and in reliance upon said representations, etc.

The answer was, in substance, that plaintiffs, when they requested defendants to forward said claim for collection, entered into a written agreement with defendants, whereby the former agreed that the latter should transmit said claim for collection, by mail, to an attorney, for the account and at the risk of plaintiffs; that the attorney to whom it was transmitted by defendants, was a lawyer of good standing and repnte in his profession, and defendants had at the time no knowledge or information contrary to his general reputation for integrity; and that the moneys collected by him had not been lost through any neglect or default of defendants.

The character of the two papers respectively accepted and signed by plaintiffs at the time when the claim in question

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was left with defendants for collection, will sufficiently appear from the opinion. Plaintiffs' evidence tended to show that they had not read these receipts or become aware that they contained the clause relied upon by defendants, until after their claim had been collected by the attorney to whom it was sent. In its charge to the jury, the circuit court stated that these papers "were not merely receipts, but had provisions in them which amounted to a contract;" that if the contract between the parties was that expressed in the receipts, plaintiffs could not recover, unless it further appeared that defendants' agent to whom the account was sent, was, to defendants' knowledge, a dishonest and unfit person; but that if the jury should further find, in reference to the restrictive clause relied on by defendants, that plaintiffs, when they accepted and signed the respective receipts, did not understand that they contained such a clause, then defendants were liable for the amount collected by the attorney, whether they did or did not know of his incompetency or dishonesty.

There was a verdict for the plaintiffs; a new trial was denied; and defendants appealed from a judgment pursuant to the verdict.

For the appellants, there was a brief by *Finches, Lynde & Miller*, and oral argument by *Mr. Lynde*. They contended, 1. That upon the question whether, if the account had been left by plaintiffs with defendants for collection without any special contract, defendants would have been liable for the acts of the attorney employed by them, there is a conflict of authorities; but that the weight of authority in this country is against the liability. *Stacy v. Dans Co. Bank*, 12 Wis., 633; *Fabens v. Mercantile Bank*, 23 Pick., 330; *Dorchester Bank v. N. E. Bank*, 1 Cush., 177; *Warren Bank v. Suffolk Bank*, 10 id., 582; *East Haddam Bank v. Scoville*, 12 Conn., 303; *Agricultural Bank v. Com. Bank*, 7 Sm. & M., 592; *Citizens' Bank v. Howell*, 8 Md., 530; *Hyde v. Planter's Bank*, 17 La., 560; 2 Rob. (La.), 294; *Bellemire v. Bank of*

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U. S., 4 Whart., 105. 2. That a party to a written contract cannot be permitted to prove that he did not read it or know its contents when he signed it. See *Upton v. Tribilcock*, 91 *U. S.*, 50, citing *Jackson v. Croy*, 12 Johns., 427; *Lies v. Stub*, 6 Watts, 48; *Farley v. Bryant*, 32 Me., 474; *Coffing v. Taylor*, 16 Ill., 457; *Stapylton v. Scott*, 13 Ves., 427; *Alvanly v. Kinnord*, 2 M. & G., 7; *S. C.*, 29 Beav., 490. See also *Germania F. I. Co. v. R. R. Co.*, 72 N. Y., 90; *Hill v. Railroad Co.*, 73 id., 351; *Wheaton v. Fay*, 62 id., 283; *Grace v. Adams*, 100 Mass., 505; *Winslow v. Driskell*, 9 Gray, 363; *McCormack v. Molburg*, 43 Iowa, 562; *Bell v. Byerson*, 11 id., 233; *Rogers v. Place*, 29 Ind., 577; *Nebaker v. Cutsinger*, 48 id., 436; *Bank of Washington v. Triplet*, 1 Pet., 30; Kerr on F. & M., 77. To escape liability upon the contract, mistake or fraud in its execution must be both alleged and shown. *Armstrong v. Grand Trunk R'y Co.*, 18 Am. Law Reg., N. S., 439; *L. & N. Railroad Co. v. Brownlee*, 9 Cent. L. J., 101; *Kirkland v. Dinsmore*, 62 N. Y., 179; *Hill v. Railway Co.* and *Germania F. I. Co. v. Railway Co.*, *supra*. 3. That the contract for a limited service and a limited liability was valid. *Stacy v. Dane Co. Bank*, *supra*; *Bradstreet v. Everson*, 72 Pa. St., 134-5.

For the respondents, there was a brief by *Markhams & Smith*, and oral argument by *E. P. Smith*. They contended, 1. That where persons holding themselves out as a collecting agency receive accounts for collection by their agents, they must be regarded as undertaking to transmit for collection to a faithful and responsible agent. *Bradstreet v. Everson*, 72 Pa. St., 124; *Riddle v. Poorman*, 3 Penn., 224; *Cox v. Livingston*, 2 W. & S., 103; *Krause v. Dorrance*, 10 Barr, 462; *Wingate v. Mechanics' Bank*, id., 104; *Rhines v. Evans*, 16 P. F. Smith, 192; *Lewis v. Peck*, 10 Ala., 142; *Pollard v. Rowland*, 2 Blackf., 22; *Cummins v. McLain*, 2 Ark., 402; *Wilkinson v. Griswold*, 12 Sm. & M., 669; *Montg. Co. Bank v. Albany Bank*, 8 Barb., 396. Cases like *Fabens v. The*

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Mercantile Bank, 23 Pick., 330, and other bank cases cited for the appellants, are greatly controlled by "the general custom of merchants and bankers, and the implied obligations upon the latter resulting from their relations," as is stated by SHAW, C. J., in the *Fabens* case. But some authorities hold that even a bank sending paper to another bank for collection, is liable for the malfeasance or negligence of the latter as its agent. *Bank of Wash. v. Triplet*, 1 Pet., 25; *Allen v. Merchants' Bank*, 22 Wend., 215; *Bellemire v. Bank of U. S.*, 4 Whart., 105, 513; *Van Wart v. Woolley*, 3 Barn. & Cress., 439. 2. That the receipts relied upon by defendants would not bear the construction contended for by them; but that if thus construed they would permit the defendants to take advantage of their own wrong, and would be void as contrary to public policy. *Candes v. W. U. Tel. Co.*, 34 Wis., 471-5; *True v. Int. Tel. Co.*, 60 Me., 9; *Tyler v. W. U. Tel. Co.*, 8 Alb. L. J., 181; *Birney v. N. Y. & W. Tel. Co.*, 18 Md., 341; *Ellis v. Am. Tel. Co.*, 13 Allen, 226; *Sweatland v. Ill. & M. Tel. Co.*, 27 Iowa, 433; *U. S. Tel. Co. v. Wenger*, 55 Pa. St., 262; *Redpath v. W. U. Tel. Co.*, 112 Mass., 71; *Clarke v. Holmes*, 7 H. & N., 938; *Scott & J. on Tel.*, §§ 201-2. Such a contract, so construed, would also be in violation of the doctrine that a principal is estopped from denying his liability through an agent, especially when the agent has been guilty of fraud. *York v. Railroad*, 3 Wall., 107; *Transp. Co. v. Downer*, 11 id., 129; *Erie & W. Transp. Co. v. Dater* (S. C. Ill.), 8 Cent. L. J., 293.

COLE, J. We are all clear in the opinion that this case must be decided upon the receipts offered in evidence, which constitute the contract, and fix the rights and liabilities of the parties. These receipts are plain and distinct in their language, and no good reason was suggested on the argument why they are not valid and binding upon the parties executing them. True, it was said by the learned counsel for the plaintiffs, that

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the proof shows that *Mr. Rockwell* did not read the receipts, or know or understand that they contained a clause restricting the liability of the defendants. To this remark we answer in the words used by this and other courts when considering a similar question. It is not claimed that he was overreached or deceived otherwise than in the fact that he did not read or understand the contract which he signed; but that was his own negligence. It will not do for a man to enter into a contract, and, when called upon to abide by its conditions, say that he did not read it when he signed it, or did not know what it contained. *Fuller v. Madison Mutual Insurance Co.*, 36 Wis., 599; *Upton v. Tribilcock*, 91 U. S., 45; *Wheaton v. Fay*, 62 N. Y., 275; *Germania Fire Insurance Co. v. M. & C. Railroad*, 72 N. Y., 90; *Hill v. S., B. & N. Y. Railroad*, 73 N. Y., 351.

Of course we are considering a case relieved from all pretense of fraud or imposition, for nothing of the kind was used in procuring the contract. The only reason for claiming that the plaintiffs are not bound by the restrictive clause in the receipts is, that *Rockwell* did not read them or understand that they contained such a restrictive clause when the papers were executed. But if he failed to read or understand the contract, it was his own fault, and the plaintiffs alone are responsible for the omission. Therefore, under the circumstances, we all think that the contract is binding upon the parties, and it must be conclusively presumed that they understood its terms and assented to them. This being so, the question is, What was the extent or degree of responsibility assumed by the defendants in the transaction? A majority of the court are of the opinion that the defendants were only liable, under the contract, for gross negligence in the selection of the attorney to whom the plaintiffs' account was sent for collection.

On the delivery of the account to the defendants, they gave the plaintiffs a receipt to the effect that the account was to be transmitted by mail, for collection or adjustment, to an attor-

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ney, at the risk and on the account of the plaintiffs — the proceeds to be paid over or accounted for to the plaintiffs when received by the defendants from the attorney. At the same time a receipt was signed by the plaintiffs in the books of the defendants, stating the amount of the account, and that the claim was to be transmitted by mail to an attorney, at the risk and for the account of the plaintiffs. Such are the conditions of the receipts which constitute the contract between the parties; and the question therefore is, What liability did the defendants assume in the matter? On the part of the plaintiffs it is insisted, that, as the defendants held themselves out to the world as a collecting agency, when they received the account of the plaintiffs, they undertook either to collect it themselves, or remit the same to some suitable attorney in that part of the country where the debtors lived, to make the collection, and that they became responsible for the negligence or misconduct of the attorney whom they employed for that purpose.

It well may be that such would be the responsibility of the defendants, were it not for the restrictive clause in the receipts. But that clause, if any effect is given to it, clearly limits that liability; for it provides that the account is to be transmitted to an attorney for collection at the risk of the plaintiffs. Such being the case, we think the defendants are not liable for the acts or default of the attorney employed by them, unless in the selection of such attorney they were guilty of gross negligence; for it seems to us it was competent for the parties, by express contract, to limit the liability which the law would otherwise impose upon the defendants for the acts of the attorney employed by them to make the collection. We are not aware of any principle of law or public policy which condemns such a contract. In respect to the employment of sub-agents or substitutes, when provided for in the letter of attorney, Mr. Justice STORY lays down the general rule to be: "In such cases it is clear that the original attorney or agent will not be liable for the acts or omissions of the substitute appointed or em-

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ployed by him, unless, in the appointment or substitution, he is guilty of fraud or gross negligence, or improperly coöperates in the acts or omissions." Story on Agency, § 201. Notwithstanding the clause in the receipts, it is sought to render the defendants responsible for the loss of the money collected by the attorney; in other words, virtually to make the defendants guarantors of the fidelity and integrity of such attorney, although there is not a particle of proof which tends to show that they were guilty of gross negligence in selecting him. We have not been referred to any case which carries the liability of an attorney or collecting agency to such an extent, under a contract like the one before us.

The case of *Bradstreet v. Everson*, 72 Pa. St., 124, was much commented on by counsel on both sides as sustaining their respective positions; but, as we understand that case, it does not sustain the views of plaintiffs' counsel. The court there decides, in effect, that a collecting agency which invites customers on the ground that it has facilities for making distant collections, and selects its agents to do its business, is liable for collections made by its agents, when it undertakes the collection by the express terms of its receipt. But the court expressly say, if the agency does not intend to assume such a liability, it has it in its power to limit its responsibility by its receipt; and, as the receipt in that case contained no such restriction, the defendants were held liable for the collection made by one of its attorneys, to whom it had sent a claim belonging to the plaintiff.

The majority rest the decision expressly upon the restrictive clause in the receipt. Perhaps a greater liability might arise in the absence of such clause; but this is a point we need not consider, as we all agree that the restriction is legal and effectual. The majority think that the defendants are only responsible for gross negligence in selecting the attorney to whom the claim was sent for collection. That view is so in conflict with portions of the charge of the court below, which were

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excepted to, in regard to the rule of diligence imposed by the contract upon the defendants, that it must work a reversal of the judgment.

Therefore, without considering any other point, the judgment of the court must be reversed, and a new trial ordered.

By the Court. — So ordered.

LYON and TAYLOR, JJ., dissented.

TOWNSEND VS. SMITH.

- (1) JURISDICTION of the person obtained through fraud: summons set aside.
(2) Effect of voluntary appearance.

1. Where the defendant in a civil action has been induced by plaintiff's fraudulent representations to come within the jurisdiction of the court, the summons then served upon him will be set aside, although the design of the representations was to obtain his arrest upon a criminal charge, and the institution of the civil action was an afterthought.
2. *It seems* that in such a case the action should be dismissed even after defendant has made a voluntary general appearance therein; but whether there was such an appearance in this case, is not determined.

APPEAL from the Circuit Court for *Waukesha* County.

The plaintiff is the owner of a hotel in Oconomowoc, in this state; and the defendant, being a resident of Chicago, and the publisher of a newspaper in that city called *The Hotel World*, published an article in said newspaper derogatory to the character of the plaintiff, and severely censuring him for the manner in which he conducted his hotel business. Soon after this publication, plaintiff, by means of the false and fraudulent pretenses that he desired to advertise his hotel for sale in *The Hotel World*, and also desired the defendant to examine the property, and that he would pay the defendant's expenses if the latter would visit Oconomowoc for that purpose, induced the defendant to go from Chicago to Milwaukee. As soon as he arrived at Milwaukee, he was arrested by virtue of a war-

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rant issued on complaint of the plaintiff in behalf of the state, charging him with the offense of libel committed by the publication of the aforesaid article. While he was in the custody of the officer on the criminal charge, plaintiff caused the summons in this action to be served on him.

The false and fraudulent pretenses aforesaid were made by the plaintiff for the sole purpose of getting the defendant within the jurisdiction of the court so that process might be served upon him.

On affidavits showing the foregoing facts, the attorneys for the defendant, who appeared specially for the purposes of the motion alone, obtained an order on the plaintiff to show cause why the service of the summons should not be set aside, "and why said defendant should not have such other and further relief as to the court shall seem meet and just, and the costs of this motion." The order contains a stay of proceedings.

On the hearing of the motion, an affidavit of the plaintiff was read in opposition thereto, in which he denies that he perpetrated the fraud and trick charged to enable him to get service of summons on the defendant in this state, and alleges that the service of the summons was first suggested to him after the defendant had been arrested on criminal process. The affidavit contains no other defense to the motion, and no excuse for or palliation of the fraud perpetrated upon the defendant.

The circuit court denied the motion on the ground that "the defendant has procured a stay of proceedings herein, and that by such stay he has entered an appearance and waived all defects in the original service of the summons."

The defendant appealed from the order.

For the appellant, there was a brief by *Johnson, Rietbrock & Halsey*, and oral argument by *Mr. Johnson*. They contended, 1. That where the whole relief sought by a motion is the setting aside of an illegal proceeding, or where the motion is strictly incidental and subsidiary to that relief, there is no general appearance (*Blackstone v. Sweet*, 38 Wis., 580); and

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that the power to dismiss proceedings for want of jurisdiction implies the power to stay the proceedings while the question of jurisdiction is being inquired into. *U. M. Trans. Co. v.*

Whittaker, 16 Wis., 220, differs from this in that the order to stay proceedings obtained by the defendant in that case was obtained for the purpose of further proceedings after the question of jurisdiction had been decided in plaintiff's favor.

2. That the prayer for further relief and for costs of the motion was not a general appearance. (1) The relief sought was only such as might be deemed by the court consistent with the purposes of the motion. (2) Where a cause *originally brought* in the circuit court is dismissed by it for want of jurisdiction, it may grant defendant costs of the motion. Compare *Mitchell v. Kennedy*, 1 Wis., 511; *Pratt v. Brown*, 4 id., 188; *Boyce v. Foote*, 19 id., 199, with *Paine v. Chase*, 14 id., 653. 3. That the motion should have been granted on the merits. *Carpenter v. Spooner*, 2 Sandf. S. C., 717; *Goupil v. Simonson*, 3 Abb. Pr., 474; *Bulkley v. Bulkley*, 6 id., 307; *Metcalf v. Clark*, 41 Barb., 45; *Benninghoff v. Onwell*, 37 How. Pr., 235.

For the respondent, there was a brief by *Joshua Stark* and *D. G. Rogers*, and oral argument by *Mr. Stark*. They contended,

1. That if a defendant, seeking the dismissal of an action on the ground of a defective service of the summons, asks for *any other relief*, or for that relief on *any other ground*, this is a waiver of the defect. *Barnum v. Fitzpatrick*, 11 Wis., 81; *Northrup v. Shephard*, 26 id., 220; *Grantier v. Rosecrance*, 27 id., 488; *Anderson v. Coburn*, id., 558; *Baizer v. Lasch*, 28 id., 268; *Alderson v. White*, 32 id., 308; *Blackburn v. Sweet*, 38 id., 578; *Coad v. Coad*, 41 id., 23. The defendant appeared generally, (1) By asking other and further relief. Relief is often granted under such a general prayer. 4 Wait's Pr., 596; *Bellinger v. Martindale*, 8 How. Pr., 113. (2) By procuring a stay of proceedings. *Ins. Co. v. Swineford*, 28 Wis., 257; *U. M. Transp. Co. v. Whittaker*, 16

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id., 220. 2. That the case did not show that defendant was induced to come within the jurisdiction with a view to the service of a summons upon him in this action.

LYON, J. If a person is induced by false representations to come within the jurisdiction of a court for the purpose of obtaining service of process upon him, and process in an action brought against him in such court is there served, it is an abuse of legal process, and, the fraud being shown, the court will, on motion, set aside the service. This rule is elementary, and has been uniformly enforced in numerous cases both in this country and England. The principle of the rule seems to be that "a valid and lawful act cannot be accomplished by any unlawful means; and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights." Per SHAW, C. J., in *Ilseley v. Nichols*, 12 Pick., (270), 276.

In the present case the plaintiff inveigled the defendant, by artifice and falsehood, to come within the jurisdiction of the court in which the action was brought. The means by which the service of the summons was obtained, being fraudulent, were unlawful. The remedy which the law affords in such a case is to set aside the process.

This remedy is not given upon the ground that, by reason of the fraud, the court did not get jurisdiction of the person of the defendant by the service, but upon the ground that the court will not exercise its jurisdiction in favor of the plaintiff who has obtained service of his summons by unlawful means. When that fact is made to appear — especially if the defendant has been guilty of no laches, — the court should vindicate the integrity of its process by setting aside the service and turning the plaintiff out of court as a punishment for his gross fraud.

As already observed, courts have uniformly so proceeded in

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such cases, and we do not find that any court has ever stopped to inquire, under such circumstances, whether the appearance of the defendant is general or special. Such a case is entirely unlike one in which there has been a failure of proper service of process; for there the failure affects only the defendant, while here the fraud affects the integrity of the process of the court. Surely a general appearance to the action ought not to bar the court from vindicating the integrity of its own process, and we have seen no case which gives that effect to a general appearance.

We are of the opinion, therefore, that the ground upon which the learned circuit judge denied the motion to set aside the service of the summons is untenable, even though the defendant has appeared generally, which we greatly doubt. It is unnecessary, however, to determine the character of the appearance.

It was suggested, but scarcely argued, by the learned counsel for the plaintiff, that because his client committed the fraud for the sole purpose of getting the defendant within this state, so that he might be arrested on criminal process — this action being the result of an afterthought, — the service of the summons should be upheld.

The suggestion is hardly worthy of notice. The defendant was within the jurisdiction of the court by means of the fraud of the plaintiff; and no act of his, which that fraud enabled him to accomplish, can be allowed to stand, whether such act was predetermined or not. The court will not permit him to utilize his fraud for any purpose. In *Ex parte Wilson*, 1 Atk., 152, Lord Chancellor HARDWICKE said: "Even at law, where there is an irregular arrest, and an advantage is taken of the irregularity to charge him in custody at the suit of another person, the courts of law will discharge him from both."

We conclude that the court below should have granted the motion.

In addition to those above cited, the following are some

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of the cases which it is believed sustain the views above expressed: *Snelling v. Watrous*, 2 Paige, 314; *Carpenter v. Spooner*, 2 Sandf., 717; *Williams v. Bacon*, 10 Wend., 636; *Clark v. Metcalf*, 41 Barb., 45; *Goupil v. Simonson*, 3 Abb. Pr., 475; *Bulkley v. Bulkley*, 6 Abb. Pr., 307; *Dunlap v. Cody*, 31 Iowa, 260; *Whetstone v. Whetstone*, id., 276; *Wanzer v. Bright*, 52 Ill., 35; *Benninghoff v. Oswell*, 37 How. Pr., 235; *Wells v. Gurney*, 8 Barn. & Cress., 769; *Stein v. Valkenhuyzen*, Ellis, Bl. & Ellis, 65; *Luttin v. Benin*, 11 Mod., 50.

By the Court.—Order reversed, and cause remanded with directions to the circuit court to vacate and set aside the service of the summons.

HÖEFLINGER VS. WELLS.

Partnership: Promissory note of one partner: Payment.

1. The taking, not as payment, of the individual note of one partner for money loaned, though it may be evidence that the loan was not made to the firm, is not conclusive of that fact.
2. Where such individual note of one partner is taken for a loan made *at the time* to the firm, the *presumption* is that it was *not* taken as payment. A remark in *Ford v. Mitchell*, 15 Wis., 304, doubted, but distinguished.
3. The complaint avers, in substance, that, on etc., S., as partner in the then existing firm of W. & S., borrowed from plaintiff, for and on account of and for the use of said firm, a certain sum, which loan was evidenced by a note for the amount, signed by S., dated on the same day; and that the money so loaned was expended for the use of the firm. *Held*, that, under these averments, plaintiff may show that the money was loaned by him to and upon the credit of the firm; there is no admission that the note was taken in payment; and the complaint is good on demurrer.

APPEAL from the Circuit Court for *Milwaukee* County.
Plaintiff appealed from an order sustaining a demurrer to

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the complaint as not stating facts sufficient to constitute a cause of action. The complaint is sufficiently stated in the opinion.

The cause was submitted for the appellant on the brief of *James Hickcox*.

For the respondent, there was a brief signed by *Wells & Bingham*, his attorneys, and *Jenkins, Elliott & Winkler*, of counsel, and oral argument by *D. S. Wegg*.

TAYLOR, J. The complaint alleges that at the time the indebtedness accrued, for the recovery of which this action was brought, one Michael Stafford and the defendant, *Wells*, were copartners, and did business as such at the city of Wausau, in this state, and that previous to the bringing of this action the said Stafford died, leaving the defendant his sole surviving partner.

The following are the material allegations as to the indebtedness:

"That on or about the tenth day of April, 1873, at said city of Wausau, Wisconsin, the said Michael Stafford, as such copartner, borrowed from the plaintiff, for and on account of and for the use of said firm, the sum of \$1,500, with interest at the rate of 10 per cent. per annum till paid; that the money so loaned by the plaintiff to said Stafford for and on account of said firm was evidenced in writing, signed by the said Stafford, and was a note for \$1,500, and was dated April 10, 1873, and drew interest at the rate of 10 per cent. per annum until paid."

There are other allegations showing that the money borrowed was expended for the use of the firm.

It is insisted by the learned counsel for the respondent, that the foregoing allegations of the complaint show that the money was borrowed by and loaned to said Stafford by the plaintiff upon the sole credit of said Stafford, and not upon the credit of the firm, and therefore no cause of action is stated against

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defendant. We do not think this a just construction of the complaint. The language above quoted, construed liberally in favor of the plaintiff, is that Stafford, as copartner of *Wells*, borrowed the money for the firm, and that the money was loaned to the firm, and not to Stafford. Had it not been for the subsequent allegation that a note was given to the plaintiff for the amount of the money so loaned, signed by said Stafford, payable at a certain date, with interest as therein stated, there would have been no doubt as to the meaning of the first allegation. But it is insisted that this latter allegation shows that the plaintiff took the individual note of Stafford for the amount of the money loaned, and therefore shows conclusively that the loan was not made to the firm or upon its credit, but to Stafford and upon his sole credit.

It might be urged against this construction given to the latter allegation, that it does not clearly show that the note given was the individual note of Stafford; that the allegation that the note was signed by Stafford is not inconsistent with the fact that he signed it with the firm name.

But, admitting that the fair construction of the complaint is that the plaintiff took the individual note of Stafford for the amount of the money loaned, yet, in our view of the construction which must be given to the allegation as to the borrowing of the money, the giving of the individual note of one of the partners for the money borrowed by the firm would be no bar to a recovery against the firm after the note became due and remained unpaid.

If upon the trial the plaintiff can show that the money was borrowed for the firm, that he was at the time advised that it was for the firm, and that he loaned it to the firm and upon its credit—and, as we construe the allegations of the complaint, they are sufficient to admit such evidence,—then the mere taking of the individual note of the one partner for the money so loaned will not defeat the action. The taking of such note may be evidence tending to show that the

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money was not loaned to the firm, and that the sole credit was given to Stafford; but it is not conclusive of that fact; and if the jury or the court should find as a fact that the money was borrowed by and loaned to the firm, and upon its credit, then the taking of the individual note of one member of the firm would not be a payment of such firm debt, unless it was affirmatively shown that such note was taken in payment of the same. *Sheehy v. Mandeville*, 6 Cranch, U. S., 256-264; *Folk & Smith v. Wilson*, 21 Md., 548-551; *Glenn v. Smith*, 2 Gill & J., 508; *Md. & N. Y. Coal & Iron Co. v. Wingert*, 8 Gill, 176; *Whitney v. Goin*, 20 N. H., 354-358; *Wright v. Crockery Ware Co.*, 1 N. H., 281; *Johnson v. Weed*, 9 Johns., 310; *Schemerhorn v. Loines*, 7 Johns., 311; *Monroe v. Hoff*, 5 Denio, 360-362; *Porter v. Talcott*, 1 Cow., 383; *Vail v. Foster*, 4 N. Y., 312-314; *Muldon v. Whitlock*, 1 Cow., 290-306; *Breed v. Cook*, 15 Johns., 241; *Wilson v. Force*, 6 Johns., 110; *Read v. Hutchinson*, 3 Camp., 351-2; *Owenson v. Morse*, 7 T. R., 64; *Soffe v. Gallagher*, 3 E. D. Smith, 507; *Blunt v. Walker*, 11 Wis., 334; *Ames v. Ames*, 5 Wis., 160; *Williams v. Starr*, id., 534; *Davenport v. Schram*, 9 Wis., 119; *Eastman v. Porter*, 14 Wis., 39; *Ford v. Mitchell*, 15 Wis., 304; *Webster v. Stadden*, 14 Wis., 277; *Lindsey v. McClelland*, 18 Wis., 481; *Williams v. Ketchum*, 21 Wis., 432; *Paine v. Voorhees*, 26 Wis., 522; *Aultman & Co. v. Jett*, 42 Wis., 488; *Aultman & Taylor Co. v. Hetherington*, id., 622.

The distinction suggested by the late learned Chief Justice DIXON, in his opinion in the case of *Ford v. Mitchell*, *supra*, as to the burden of proof where the note of a third person is received upon the sale of goods, or for an indebtedness contracted at the time, I am inclined to think is not supported by the weight of authority; but if in such case the burden of proof would be upon the plaintiff to show that such note was not taken in satisfaction of the debt, it would not avail the defendant on this demurrer, as the allegation of the complaint, if construed as contended for by the defendant, negatives the

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idea that the note of the one partner was taken in payment of the loan to the firm. It is probable that the taking of the separate note of one of two joint debtors, for the joint debt, would not come within the rule suggested by the learned chief justice in the case above cited. See *Sheehy v. Mandeville* and *Muldon v. Whitlock*, *supra*. The real question in the case is, whether the loan was made to the firm instead of to Stafford. If it was made to the firm, then the taking of the several notes of Stafford was not a satisfaction of the debt of the firm, unless it was so agreed to be at the time of making the loan. We think the allegations of the complaint show that the loan was made to the firm, and the other allegations do not show that the note of Stafford was taken in satisfaction and payment thereof.

We think the complaint states a cause of action, and that the demurrer should have been overruled.

By the Court.—The order of the circuit court is reversed.

SCHNUR VS. SOHNUR and another. APPEAL OF HICKCOX.

Clerk of Court. Order on former clerk to pay over money.

1. Money was paid into court by a defendant to keep good an alleged tender, and judgment was ordered for plaintiff on the ground that no sufficient tender had been made; but such judgment was never entered, because the controversy was settled by the parties. On motion of said defendant (with due notice to all parties), and on proof that he was entitled to such moneys as against the plaintiff, the court made an order requiring its former clerk, by whom such money had been received, and not paid over to his successor, to pay the same to the moving party. *Held*, no error. *Schnur v. Hickcox*, 45 Wis., 200.
2. Whether the court can enforce its order by attaching its former clerk, not considered.

APPEAL from the County Court of *Milwaukee* County.

Schnur vs. Schnur and another. Appeal of Hickcox.

A sum of money was paid into court in this action by the defendant *Adam Schnur*, the respondent in this appeal, to keep good a tender thereof alleged to have been made by him to the plaintiff in satisfaction of the contract in suit. The money was paid to *James Hickcox*, who was then clerk of the circuit court for Milwaukee county, in which the action was pending.

The cause was tried, and the trial resulted in a finding that no sufficient tender had been made. Judgment for the plaintiff was ordered, but never entered, the controversy having been settled by the parties.

On due notice to all parties interested, the respondent moved the circuit court for an order requiring *Mr. Hickcox* to pay over the money to him, and showed that he is entitled to the money, and that the same is in the hands of *Mr. Hickcox*. The court so ordered, and *Hickcox* appealed from the order.

The cause was submitted on the brief of *J. V. V. Platto* for the appellant, and that of *Murphey & Goodwin*, for the respondent.

LYON, J. *Schnur v. Hickcox*, 45 Wis., 200, was an action on the official bond of the appellant, as clerk of the circuit court, to recover the money mentioned in the order from which this appeal was taken. The money having been paid into court for the plaintiff, it was held, in substance, that there could be no recovery in that action until the court should, upon proper proceedings, adjudicate that it belonged to the respondent, *Adam Schnur*, instead of the plaintiff. We also indicated the proper practice to obtain an adjudication in that behalf, and the practice thus indicated has been strictly pursued by the respondent. Moreover, the motion papers show that he is entitled to the money, and that it is in the hands of the appellant. Under these circumstances no good reason is perceived for disturbing the order. Whether the court has authority to attach the appellant for nonpayment

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of the money, is a question which was not then and is not now before us, and we intimate no opinion upon it.

By the Court. — Order affirmed.

COTTRILL, Administrator, vs. THE CHICAGO, MILWAUKEE
& ST. PAUL RAILWAY COMPANY.

RAILROADS: NEGLIGENCE. *Injury to railroad engineer. Alleged contributory negligence in refusing to jump from locomotive.*

1. In determining whether a locomotive engineer, injured by a collision while running a train upon a railway, was guilty of negligence in remaining at his post and not jumping off before the collision, the standard of ordinary care and prudence on his part must be fixed with reference to the peculiar responsibilities of his employment.
2. The mere facts that such an engineer, running a train upon a railroad, after seeing a signal to stop, and after reversing his engine, might, with probable safety to himself, have gotten off from his locomotive before its collision with another train then approaching, and that he remained at his post grasping the reversing lever and throttle until the collision occurred, will not justify the court in holding, as matter of law, that he was negligent.
3. In an action for injuries from negligence, the jury, by special verdict, found that negligence of the person injured contribute ' materially to the injury, and also found specially that, "in the exercise of ordinary care and prudence," he might have done a certain act, which, if done, would or might have saved him from the injury; and there was neither finding nor proof of any other facts tending to show contributory negligence. The special fact so found not being such that it can be said, *as matter of law*, to establish contributory negligence: *Held*, that the court below should have granted a new trial on plaintiff's motion, instead of rendering judgment for the defendant on such verdict.

APPEAL from the County Court of *Milwaukee* County.

Action for an injury to the plaintiff's intestate resulting in his death, alleged to have been caused by defendant's negligence. At the time of the accident, the deceased was a locomotive engineer in defendant's employ, and was engaged in

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operating a switch-engine in defendant's yards at the city of Milwaukee; and the injury was caused by a collision between the said engine and a train on defendant's road. The complaint alleges that about eight or nine o'clock on the evening of a certain day, the deceased had made up a train of about thirty freight cars, and, in the line of his duty, was proceeding west from said yards, upon one of defendant's tracks, with said freight cars drawn by his engine, within the limits of the city, for the purpose of backing said train in on the side tracks; that while said engine and train were thus proceeding westward at a rate of speed not greater than two or three miles per hour, they were met by another of defendant's trains, consisting of five freight cars and a locomotive engine, backing up from the west on the same track at the rate of eight or ten miles per hour, without any signal given by whistle, bell or otherwise, and without any lights being displayed on the rear end of said train; that the rear car of said eastward bound train was backed with great force and violence against the engine of the deceased; that when said train was first discovered by the deceased, it was distant from six to eight car lengths; that as soon as it was discovered by him, he instantly reversed his engine; and that while he was standing upright in the cab of said engine, with his right hand on the reverse lever thereof and his left hand on the throttle lever, and instantly after such reversal of his engine, the collision of said trains occurred. The other allegations of the complaint need not be stated. The answer denies all negligence on defendant's part, and alleges that the accident occurred through the lack of care and diligence on the part of the deceased.

There was a special verdict, consisting of answers of the jury to sixteen questions submitted them by the court; and there was no general verdict. The questions and answers regarded by this court as of importance upon this appeal, are recited in the opinion.

Plaintiff moved to set aside the verdict and grant a new

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trial, upon various grounds not important here. The court denied the motion, and directed judgment in favor of the defendant, upon the verdict. Plaintiff appealed from the judgment.

For the appellant, there was a brief by *Murphey & Goodwin*, and oral argument by *Mr. Murphey*. They contended, among other things, that the only fact found from which negligence of the deceased might be inferred, was that in the first finding, viz., that the deceased, after seeing the signal to stop and reversing his engine, might have jumped from the engine before the collision. But, (1) This finding was wholly unsupported by the evidence. (2) It was the duty of the court to instruct the jury that if the deceased was placed, without negligence on his part, in a position of danger, he was not responsible, as for contributory negligence, for an honest though erroneous exercise of judgment in getting out of the danger. *Pa. R. R. Co. v. Werner*, Sup. Ct. Pa., July 9, 1879; *Schultz v. Railway Co.*, 44 Wis., 644. And if this instruction had been given, it would have been impossible for the jury to have rendered this finding.

For the respondent, there were separate briefs by *Melbert B. Cary* and *Gregory & Gregory*, and oral argument by *Alfred L. Cary* and *Charles N. Gregory*. They contended, among other things, that there was no ground for saying that the finding by which the jury declared that carelessness of the deceased materially contributed to the accident, rested wholly upon the finding that he might, in the exercise of ordinary care and prudence, have gotten from the locomotive; that the former finding was entirely independent of the latter, and was sustained by abundant evidence tending to show that the deceased acted negligently, not only in failing to use the ordinary and proper means of self-protection after the danger had become obvious, but also in exposing himself and train to the danger; that the evidence was such that the jury might well find that the deceased was negligent in going out upon the

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come-in track, instead of either using the go-out track at that time, or waiting until the outward bound train on that track had left, and then using the same track; that if the collision in this case had resulted in injury to the engineer of the train with which the deceased collided, and such engineer had brought suit, no jury would have hesitated to hold this defendant liable on the ground that Cottrill was guilty of negligence in that particular, and the court could not have set aside the finding, as not sustained by evidence; and that a like finding in this case is equally conclusive — the question being one of fact for the jury. *Strahlendorf v. Rosenthal*, 30 Wis., 674; *Langhoff v. Railway Co.*, 19 id., 489; *Dorsey v. P. & C. Cons. Co.*, 42 id., 583; *Schultz v. Railway Co.*, 40 id., 589; *Ewen v. Railway Co.*, 38 id., 613; *Bass v. Railway Co.*, 36 id., 450; *Roberts v. Railway Co.*, 35 id., 679; *Patten v. Railway Co.*, 32 id., 524; *Duffy v. Railway Co.*, id., 269.

ORTON, J. The jury found that the carelessness of the employees of the defendant materially contributed to the injury of the plaintiff; and therefore the following findings relating to the carelessness of the plaintiff need only be considered in determining the correctness or incorrectness of the judgment:

"Did the carelessness of Cottrill, deceased, materially contribute to the result complained of?" "Yes."

"Could Cottrill, after seeing the signal to stop, and reversing his engine, in the exercise of ordinary care and prudence, have gotten off from his locomotive before the collision?" "Yes."

"Could Cottrill have pulled his train out upon the go-out track, instead of the come-in track, and switched his cars by so doing?" "Yes."

"If Cottrill had moved his train of 33 cars upon the go-out track, at the time he was going out, would he not have been in danger of the train going out on the Prairie du Chien track at 8:50?" "Yes."

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These special findings must be presumed to be all the facts found by the jury upon which the carelessness of the appellant was predicated; but, if such was not the presumption, there appear to have been no other acts or omissions of the appellant proved which show any carelessness on his part.

Treating these two last findings as still leaving the inference that the deceased was negligent in not taking the go-out track, notwithstanding the danger of a collision on that track with the Prairie du Chien train, as contended by the learned counsel of the respondent—which, to say the least, is very questionable,—the only other finding on which the general finding of the carelessness of the deceased was or could be predicated, is, that in the exercise of ordinary care and prudence he could have gotten off from the locomotive after the signal to stop, and after reversing his engine, and thus have escaped danger. Did his failure to jump off from the locomotive at the time and under the circumstances constitute such negligence on his part as to prevent a recovery?

It was in evidence that his fireman, on seeing the danger from a collision, jumped off and landed on the ground safely, and that the last he or anybody saw of the deceased, he was standing up in front of the boiler, and had the reverse lever in his right hand and the throttle in his left, and while he was in this attitude the collision took place, and by the concussion the tender was driven forward and against the deceased, and confined and crushed him against the hot boiler, and by this means, after great agony and suffering, he was killed.

According to the common appreciation of human conduct and character, this evidence presents an example of heroic bravery and fidelity to duty at the post of danger, most praiseworthy and commendable, and an occurrence worthy of lasting record in the book of heroic deeds. The very employment of the locomotive engineer, with its manifold and sudden and unexpected dangers, requires the highest type and best qualities of true manhood, invincible bravery and great

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integrity; and it is but just to say that, as a rule, those who are selected for and engaged in this responsible employment, possess the full measure of these qualities, and the exceptions are very rare.

They are not men likely to jump off from their locomotive and run away to escape uncertain danger, or to omit any duty in sudden emergencies; and it is well that they are not. They are placed in charge of one of the mighty forces of nature, held in servitude by the most dangerous and intricate machinery, and great skill, unremitting attention, sleepless vigilance and fearlessness of danger are required to keep them in constant control. Their standard of ordinary care and prudence must be fixed and measured by the dangers and responsibilities of such an employment, and not by the common accidents of less responsible service. The question which should determine their reasonable care, or want of common care, is, how careful and prudent locomotive engineers would ordinarily and commonly act at such a time, in such a place, and under such circumstances, and not how firemen or other employees would or should. To hold as matter of law in this case that the deceased was guilty of a want of ordinary care and prudence, as the engineer in charge of the locomotive and of the train, in not jumping off at this crisis and abandoning his engine, from the mere apprehension of uncertain danger, would make a legal precedent very dangerous to the railway service in life and property, and by which it would be exceedingly difficult, if not impossible, to distinguish the cases and the circumstances in which it would or would not be the duty of an engineer to jump off and desert his engine, or to determine in point of time when he should do so, and the necessity or prudence for him to do so.

Can it be said in this case that the deceased had reason to know, or the means of knowing, that by remaining at his post he would be injured, and that by jumping off he would not? Who shall sit in judgment upon this brave engineer to coolly

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determine the alternative risks and chances which he is compelled to take instantly, with scarcely a moment of time for deliberation in such a terrible emergency. It will not do to establish a rule by which the duty of an engineer in such an emergency may be measured and dictated by cowardice and timidity, and by which his standing at his post and facing danger will be carelessness and negligence. The defense resting upon such a theory in this case cannot be sanctioned, although cases may possibly arise in which even the common prudence of an engineer might require him to leave his engine to escape danger; but such cases will be rare exceptions, and depend upon very peculiar circumstances.

In the case of *Rood v. The Am. Ex. Co.*, 46 Wis., 639, this court very recently refused to disturb the verdict of the jury when they found that the driver of a vehicle in the street, in collision with another vehicle, was *careless* because he jumped from his wagon and let go of the lines of his team. The jury may have found the negligence of the deceased to have consisted solely in his not jumping off from his engine; and from the two questionable and nearly contradictory findings upon the question whether he might not have taken another track, they probably did so find. Such a verdict did not warrant the judgment.

By the Court. — The judgment of the county court is reversed, with costs, and the cause remanded for a new trial.

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KENTZLER VS. THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, Garnishee.

(1) Garnishment. (2) Jurisdiction of circuit court to issue execution to another county. (3) What execution must show.

1. Garnishment in aid of an execution can be maintained only where the execution is *valid*.
2. The circuit court for any county of this state has no authority to issue an execution to another county, except that conferred by statute (sec. 2971, R. S.; sec. 5, ch. 134, R. S. 1858), which authorizes the execution to issue to the sheriff of any county where the judgment is docketed.
3. An execution, to be valid, must show on its face the authority to issue it; and, if issued by the circuit court for one county to the sheriff of another county, it is invalid if it fails to recite that the judgment is docketed in the latter county. *Smith v. Buck*, 22 Wis., 577, explained; and *Sabin v. Austin*, 19 Wis, 421, distinguished.

APPEAL from the Circuit Court for *Milwaukee* County.

On the 13th of September, 1878, an execution issued from the circuit court for Dane county to the sheriff of Milwaukee county. It recited that, in an action in the municipal court for the city of Madison, between *Andrew Kentzler*, plaintiff, and C. S. Hardy, defendant, a judgment was rendered September 1, 1877, in favor of said plaintiff and against said defendant, for \$79.90, as appeared by a transcript of said judgment filed and docketed in the office of the clerk of the circuit court for Dane county on September 24, 1877, and that \$79.90 was then actually due thereon, besides interest. It then proceeded as follows: "Therefore we command you that you satisfy the said judgment out of the personal property of said debtor within your county; or if sufficient personal property cannot be found, then out of the real property in your county belonging to such judgment debtor on the day when the said transcript was so filed and docketed in your county, or at any time thereafter; in whose hands soever the same may be," etc.

On the 14th of December, 1878, W. C. Williams made an
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affidavit as in a proceeding in the circuit court for Milwaukee county, entitled "Andrew Kentzler, Plaintiff, vs. C. S. Hardy, Defendant, The Chicago, Milwaukee & St. Paul Railway Company, Garnishee." The affiant states that he represents the above named plaintiff, and makes the affidavit on his behalf; and that execution has been issued against the property of said defendant, and the time for its return has not expired. He then adds the statements required by sec. 2753, R. S., to show the liability of the garnishee. Subjoined to the affidavit was a garnishee summons in the form prescribed by sec. 2754, R. S. The summons and affidavit were served on the *Railway Company* December 14, 1878.

Afterwards, on hearing an order to show cause why the summons and affidavit should not be set aside, "for the reason that said affidavit does not state facts sufficient to give the court jurisdiction thereof, or to entitle the plaintiff to a disclosure from said garnishee," the circuit court made an order setting aside the affidavit and summons; and plaintiff appealed from the order.

For the appellant, there was a brief by *H. W. Chynoweth* and *W. C. Williams*, and oral argument by *Mr. Williams. Melbert B. Cary*, for the respondent.

[The precise question upon which the cause went off here, is not discussed in the briefs.]

RYAN, C. J. The execution on which the proceeding of garnishment was taken, is returned amongst the motion papers, and must be held to have been before the court below on the motion.

It is the foundation of the proceeding. The jurisdiction, so to speak, of the proceeding of garnishment rests on the execution; and a defect in the execution fatal to its own validity, is equally so to the proceeding taken upon it. *Executio est finis et fructus legis*. And, by the law governing courts generally, every court has inherent power to issue writs of execution on

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its own judgments, but not beyond its territorial jurisdiction. At the common law all process of all courts is limited to the territory over which their jurisdiction extends, and the power of any court to issue extra-territorial process is not inherent in it, but comes only by express statutory grant. *Sir Will. Herbert's Case*, 3 Reports, 11 *a*; Jacob's L. Dict., "Jurisdiction."

Section 8, art. VII of the constitution, declares that the jurisdiction of the circuit courts shall extend to all matters, civil and criminal, within the state, not excepted in that instrument and not prohibited by law. This is broad language, but should be construed in the light of other provisions of that instrument establishing the judicial system. Each circuit judge is to be elected by the people of his particular circuit, and shall reside within it. Section 7. The clerk of the circuit court of each county shall be elected by the people of the county. Section 12. Circuit courts shall be held in all counties organized for judicial purposes; and the judges of the circuit courts are permitted, and may be required by law, to hold courts for each other. So commissioners may be appointed for each county with judicial powers not exceeding those of a circuit judge at chambers. And elsewhere in the constitution is a provision limiting criminal prosecutions to the county or district of the offense charged. Section 7, art. I.

The constitution recognizes a manifest distinction between the civil jurisdiction which it vests, *ex proprio vigore*, in the circuit courts, and that which it does not specifically confer, but authorizes to be conferred by law on those courts. The terms used in the definition of jurisdiction, in section 8, sufficiently show the design of the constitution that the original civil jurisdiction of those courts should be largely subject to legislative control. So far as the constitution itself operates as a specific grant of territorial jurisdiction, it is manifest that it is the same in civil and criminal matters; for it is one equal grant, without discrimination between the two. And the lim-

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itation of territorial jurisdiction in criminal matters operates as a limitation of territorial jurisdiction in civil matters, so far as the constitution itself confers the latter. But, while the limitation of criminal jurisdiction is absolute, controlling all legislation on the subject, it operates to restrain only the direct grant of civil jurisdiction in the constitution itself, and leaves untouched the general definition of territorial jurisdiction in civil matters, which the circuit courts may have, and does not import any restraint of legislative power to extend the latter to the full scope of the definition; for it applies to criminal jurisdiction positively and directly, to civil jurisdiction indirectly only. And all the clauses of the constitution, taken together, clearly limit the territorial jurisdiction of the circuit court, directly conferred by that instrument, to the county in which it is held; clearly design the circuit court in each county to be a county court, with jurisdiction, civil and criminal, limited to the county, subject to a general, perhaps unlimited, power of the legislature to extend its civil jurisdiction throughout the state.

The legislative and judicial history of the state shows that this has been, practically, from the beginning, the construction put upon the constitution by the profession and by the people. The statute of June 29, 1848, providing for the first election of judges, limits the civil jurisdiction of a circuit court to its own county, as the jurisdiction of the territorial courts had been limited; and limits its *mesne* process in civil actions to its proper county, permitting such process to go to other counties only after service of some of the defendants in its own county. Various provisions followed from time to time, enlarging the power in civil proceedings, until now *mesne* process in transitory actions may generally issue throughout the state. But the power is strictly statutory, and a circuit court can send its process out of its own county only under some positive provision of statute. See, generally, *Allen v. The State*, 5 Wis., 329; *State v. Pauley*, 12 Wis., 537; *Pereles*

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v. Albert, id., 666; *State v. Messmore*, 14 Wis., 163; *Jarvis v. Barrett*, id., 591; *State v. Main*, 16 Wis., 398; *Lane v. Burdick*, 17 Wis., 92; *Beach v. Sumner*, 20 Wis., 274; *Arnet v. Ins. Co.*, 22 Wis., 516; *Brockway v. Carter*, 25 Wis., 510; *Re Eldred*, 46 Wis., 530.

So it is seen that the authority of the circuit court of Dane county to issue the execution in this case to Milwaukee county must come by statute. Without statutory authority, such an execution would be mere waste paper.

The only authority of law for issuing execution from a circuit court to another county is found in section 5, ch. 134, R. S. 1858, now section 2971, R. S. 1878. This provides that executions against property may be issued to the sheriff of any county where the judgment is docketed; and it cannot issue to another county where the judgment is not docketed. *Smith v. Buck*, 22 Wis., 577. It is true that the language of the opinion in this case is confined in terms to such executions as affecting realty, because the question there was the validity of a sale of realty. But the judgment of the court extends to all executions, because the statute makes no distinction between executions against realty and personalty, and gives one and the same authority to issue any execution, upon one and the same condition.

The docketing of a judgment in the county to which the execution may go is therefore a condition precedent of the authority to issue it; and it is hardly necessary to say that a statutory power upon condition precedent cannot be executed without compliance with the condition. The docketing of a judgment in another county is, so to say, jurisdictional to an execution upon it to that county; as much so as a judgment to an execution to any county. And an execution issued to one county upon a judgment docketed in another, but not in it, is very much like an execution issued without any judgment, anywhere, to support it.

An execution, to be valid, must disclose on its face the

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authority to issue it. Herman's Exec., § 55. An execution not stating a judgment to support it is void. Equally so is an execution issued to another jurisdiction, not stating the condition on which it may so issue. On this point *Smith v. Buck*, *supra*, properly understood, is conclusive. The case is not very well reported, and the opinion, perhaps, not quite accurate in terms. It did not appear in that case, as might be inferred from the report, that a transcript of the judgment had not been docketed in the county to which the execution issued. It only appeared that the execution did not so state, and on that ground the execution was excluded by the court below; and the precise point of the judgment is that the execution was void for not reciting the docketing of the judgment in the county to which it was issued. The fact that it was not so docketed did not otherwise appear; but, because the fact was not recited in the execution, the negative was probably assumed, on the ground that *quod non apparet non est*.

The question in this case is clearly distinguishable, on substantial grounds, from *Sabin v. Austin*, 19 Wis., 421. There the execution was issued to the county in which the judgment was rendered. It recited the judgment, but not the time of docketing it, in compliance with section 8, ch. 134, R. S. 1858, now section 2969, R. S. 1878. This was held to be a defect only, amendable, and rendering the execution voidable, not void. A sale under the execution was therefore upheld. But the issuing of the execution within the territorial jurisdiction of the court was within the general power of all courts, independently of statutory authority; and section 8 went only to the form of the execution, not to the authority to issue it. Matter of form, in an act done under authority, is generally amendable; not matter on which the authority rests to confer jurisdiction of the act. And a circuit court issuing an execution defective in this particular to its own county, has before it the actual docket of the judgment by which to amend the

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execution; but, issuing an execution to another county, has not the docket of the judgment in that county before it — has nothing before it by which to amend the execution.

Nothing held or said in *Jones v. Davis*, 22 Wis., 422; *Swift v. Agnes*, 33 Wis., 228, or *Allen v. Clark*, 36 Wis., 101, appears to be in conflict with the views taken in this case.

This is not the ground on which the summons to the garnishee was quashed in the court below, or on which the order was supported by counsel in this court. But, because it is a defect jurisdictional to the whole proceeding of garnishment, it has been thought most fitting to rest the judgment of this court upon it. The execution was void upon its face, would have been no protection to the sheriff, and could support no proceeding to collect it.

By the Court. — The order of the court below is affirmed.

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Costs on appeal from Justice's Court.

Under secs. 69, 73, ch. 133, Tay. Stats., and prior to the revision of 1878, where an action for an assault and battery had been commenced in justice's court, and, on appeal from a judgment for the defendant, plaintiff had recovered in the circuit court any sum, though less than \$50, as damages, he was entitled to *full costs*; and subd. 4, § 54 of the same chapter, had no application to the case.

APPEAL from the Circuit Court for *Waukesha* County.

The defendant appealed from a judgment against him.

For the appellant, there was a brief by *Ludwig & Somers*, and oral argument by *Mr. Somers*.

The cause was submitted for the respondent on the brief of *Edwin Hurlbut*.

COLL, J. The question in this case relates to the amount of

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costs which the plaintiff is entitled to have taxed in his favor. The action was for an assault and battery, commenced in justice's court. On the trial in that court there was a judgment for the defendant. The plaintiff took an appeal to the circuit court, having made the affidavit prescribed by statute entitling him to a new trial. On the trial in the circuit court there was a verdict in favor of the plaintiff for one dollar damages. The plaintiff's costs and disbursements were taxed at \$169.21. The defendant objected before the clerk to this taxation, and took an appeal therefrom to the circuit court, where the taxation of the clerk was affirmed. The counsel for the defendant claimed before the clerk and in the circuit court, as he does here, that as the action was for an assault and battery, and the verdict for the plaintiff was less than fifty dollars, the costs allowed the plaintiff should not exceed the damages. In this view of the statute we are unable to concur.

The statute which regulates as to costs on appeal generally, declares that where there is *no new trial* in the appellate court, if the judgment be affirmed, costs shall be awarded to the respondent; if reversed, costs shall be awarded to the appellant. Section 69, chapter 133, Tay. Stats. The statute further provides that the same costs, fees and disbursements shall be allowed to the successful party in cases of *new trial on appeal in the appellate court*, as on affirmance or reversal of a judgment. Section 73. In this case both conditions of this provision concur; that is to say, there was a new trial in the circuit court, and the plaintiff was the "successful party," according to the decisions of this court in *Smithbeck v. Larson*, 18 Wis., 183, and *Norwegian Church v. Thorsen*, 21 Wis., 35. Consequently the plaintiff was entitled to full costs.

But the same counsel further contends that the provisions above cited are qualified or controlled by the previous subdivision 4, § 54, which enacts that when, in an action for assault and battery, the plaintiff recovers less than \$50 damages, he shall recover no more costs than damages. See *Sherible v.*

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Janish, 13 Wis., 615, and *Filzer v. McCannan*, 14 Wis., 63. And he says this specific provision was intended to regulate the matter of costs in this class of cases, and applies to every action for an assault and battery tried in the circuit court, whether originally commenced in that court or removed there by appeal; that, unless this construction prevails, a party may bring such an action before a justice, then, on appeal to the circuit court, may increase his claim, exceeding the jurisdiction of the justice, with no danger of losing any of his costs, though he recover less than \$50 damages. It is possible that such a consequence might follow from the various provisions of the statute as we construe them. This defect, if not wholly, is to some extent remedied by section 2925 of the new revision. But under the statute as it stood when this cause was tried, the successful party in an action for a personal trespass, which had been commenced before a justice, and removed by appeal to the circuit court, where there was a new trial, recovered full costs. This, we think, is the proper construction of the statute; therefore, subdivision 4, § 54, has no application to this case.

By the Court.—The judgment of the circuit court is affirmed.

KELLOGG and others vs. COLLIER and another. COLLIER vs. KELLOGG and others.

SUPPLEMENTARY PROCEEDINGS. *In case of several such proceedings, which creditor has prior lien. Practice in such cases.*

1. In several summary proceedings supplementary to executions against the same debtor, returned unsatisfied (R. S., secs. 3028-3038),—such a proceeding being a substitute for a creditor's bill,—the creditor who first commences his proceeding and obtains service of process upon the debtor, and prosecutes the proceeding with proper diligence to the appointment of a receiver, obtains a prior lien upon the assets of the debtor; and a *bona fide* attempt to serve the process is equivalent to actual service in

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respect to priority of right, as against persons who, being chargeable with notice of the prior proceeding, commenced subsequent proceedings of the same character.

2. *Actual notice* of the prior proceeding is sufficient, where its pendency was *not shown by the records of the court.*
3. K. and C. being severally judgment creditors of X., on whose judgments executions had been returned unsatisfied, K. obtained an order from a court commissioner, March 20th, citing the debtor to an examination on the 27th, and enjoining him from disposing of his property. March 21st, the sheriff, in good faith, made an affidavit in due form, of service of the order on the debtor on the 20th; but in fact the copy order left with such debtor did not show the signature of the commissioner. March 22d, C. obtained a like order from the same commissioner, citing the debtor to an examination on the 24th; and, on the last named day, after a hearing, M. was appointed receiver, and the debtor made an assignment to him in due form the next day; but K. was not made a party or notified of these proceedings. On the 27th, immediately upon the discovery by the sheriff and K. of the defect in the service of the first order, the debtor refusing the sheriff permission to amend the copy served, that officer served a correct copy, and made due return of the facts before the hour at which the order was returnable; and, the proceeding being prosecuted with due diligence, a receiver (other than M.) was appointed therein. *Held*, that upon these facts the court, on motion, should have ordered M. to pay over the assets in his hands to be applied upon K.'s judgment.
4. The motion of K. for the relief last mentioned should have been entitled in *both* of the actions; but an error in entitling it only in his own action (to which C. was made a party for the purposes of the motion), is *held* merely technical and no ground of reversal.
- [5. The statute contemplates that different proceedings may be pending at the same time, but requires creditors prosecuting prior proceedings to be notified of the pendency of junior proceedings, and that but one receiver shall be appointed; and it is the proper practice, especially where the first proceeding is diligently prosecuted, to make the appointment in that; but the plaintiff in the junior proceeding should be allowed to proceed with the examination of the debtor, etc. (under sec. 3033), without regard to priorities.]
- [6. Other rules stated by which proceedings in such cases should usually be governed.]

APPEALS from the Circuit Court for *Waukesha* County.

Two judgments were recovered in the circuit court against Isaac Coller — one by *Henrietta A. Coller*, and the other by

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Charles P. Kellogg and others, the appellants. Executions were duly issued upon both judgments and returned unsatisfied.

March 20, 1879, the appellants, *Kellogg and others*, obtained an order from a court commissioner requiring the judgment debtor to appear before him on the 27th day of the same month, to answer concerning his property, and enjoining him from making any transfer or disposition thereof. On the 21st day of March the sheriff made an affidavit of service of the order, stating therein that he served it on the 20th of March, by delivering to and leaving with the judgment debtor, personally, a copy of the order, and of the affidavit annexed thereto, and at the same time showing him the original order, and the signature of the commissioner who signed the same. The affidavit of the sheriff was made in good faith, but was incorrect in that the name of the commissioner to the order was omitted from the copy served.

March 22, 1879, the respondent *Henrietta A. Collier* also instituted proceedings supplementary to her execution, against the judgment debtor, before the same commissioner, and procured from him an order for the examination of such debtor on the 24th of the same month. On the day last mentioned, the judgment debtor appeared and was examined concerning his property. On such examination he disclosed that he held an endowment policy of life insurance, upon which a certain sum would become due and payable to him in May following. The commissioner thereupon appointed one Martin receiver of the property and assets of the judgment debtor, and Martin gave bond and entered upon his duties as receiver on the following day. On the same 25th of March the judgment debtor executed to the receiver the usual assignment of all his property and effects not exempt from seizure on execution. The appellants were not made parties to *Mrs. Collier's* proceeding, and were not notified thereof.

Subsequently the receiver, Martin, collected of the insurance company the money payable on such policy.

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The appellants and the sheriff first discovered the defect in the copy of the order served in the appellants' proceeding on the day such order was returnable, March 27th. Thereupon the sheriff applied to the judgment debtor for leave to correct the copy served, which was refused. He then served a correct copy of the order on the judgment debtor, and made due return of such service, and of all the facts, to the commissioner, before the hour at which the order was returnable. The appellants prosecuted their proceeding with due diligence, and the same resulted in the appointment, by the commissioner, first of said Martin, who declined to serve, and then of one Chafin, as receiver of the property and effects of the judgment debtor. Chafin duly qualified as such receiver.

When *Mrs. Collier* instituted her supplementary proceeding, both she and her attorney had actual notice that the appellants had previously commenced a like proceeding on their judgment; that the order and injunction above mentioned had been issued therein; and that proper service of such order had been made upon the judgment debtor, except that the copy served wanted the name thereto of the commissioner who signed the original order.

On affidavits and records showing the above facts, the appellants moved the court for an order requiring Martin to pay over to them the money collected by him of the insurance company, and procured and served upon *Mrs. Collier* an order to show cause why Martin should not be ordered to pay over the money to them to be applied on their judgment. The order to show cause is entitled in the action of the appellants against Isaac Collier. *Mrs. Collier* appeared and resisted the motion. She also obtained an order, entitled in her action, founded upon affidavits and records showing substantially the same facts, requiring the judgment debtor and the appellants to show cause why Martin should not be ordered to pay over such money to her to be applied on her judgment. The appellants appeared and resisted the motion. The two motions

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were heard together. The motion of the appellants was denied, and that of *Mrs. Collier* was granted. These appeals are from the orders denying the one and granting the other motion.

For the appellants, there was a brief by *Lewis, Lewis & Hale* and *Wm. Street*, and oral argument by *H. M. Lewis*. They contended, among other things, 1. That, as the receiver was a mere custodian for the court, having no rights in the matter and not entitled to be heard (*Edwards on Receivers*, 12), the money was really in court, and could be disposed of by order of the court on motion of any party claiming a right to it, provided all other parties claiming it were notified and had an opportunity to be heard. 2. That under the old chancery practice, the filing of the bill and service of the subpoena, or a *bona fide* attempt to serve it, created a *lis pendens*, and in a creditor's suit gave the creditor an equitable lien upon the debtor's assets from the commencement of the action; that in analogy to this doctrine priorities between several creditors pursuing supplementary proceedings are determined by the time of the commencement of such proceedings (2 Barb. Ch. Pr., 158; 4 Wait's Pr., 128 c; Riddle's Sup. Pro., 162-7, and cases there cited; *Patterson v. Brown*, 32 N. Y., 81; *Lynch v. Johnson*, 48 id., 27; *Spear v. Wardell*, 1 id., 144; *Edmeston v. McLoud*, 16 id., 643; *Field v. Sands*, 8 Bosw., 685; *Jeffres v. Cochrane*, 47 Barb., 557; *Porter v. Williams*, 5 How. Pr., 441, affirmed in 5 Seld., 142; *Edmeston v. Lyde*, 1 Paige, 637; *Hayden v. Bucklin*, 9 id., 512; *Nieuwankamp v. Ullman*, *ante*, p. 168); and that such time of commencement is determined by the time of serving, or attempting in good faith to serve, the subpoena in a chancery action, or the order in supplementary proceedings. Riddle's Sup. Pro., 169; 4 Wait's Pr., 128 c; 16 N. Y., 543; 48 id., 27; 1 Paige, 564; 9 id., 514-15; *Ross v. Clusman*, 3 Sandf. S. C., 676; *Gree v. Oliver*, Bac. Abr., "Heir and Ancestor, F.;" *Nieuwankamp v. Ullman*, *supra*. 3. That actual

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notice of the pending proceedings was sufficient to subordinate thereto the rights of those commencing subsequent proceedings. Constructive notice is never held superior to actual notice. See *Livingston v. Cheetham*, 2 Johns., 479; *Keeler v. Belts*, 3 Code Rep., 183; *Barker v. Cook*, 16 Abb. Pr., 84; *Courter v. McNamara*, 9 How. Pr., 255. 4. That the defendant Isaac Collier had such actual notice of the order of March 20, 1879, that any disposition of his property in contravention thereof would render him liable to punishment for contempt (High on Inj., § 864; *Mead v. Norris*, 21 Wis., 310); and it was a contempt of that order to execute an assignment to the receiver under the second order. *Nieuwankamp v. Ullman*, *supra*.

For the respondents, there was a brief by *Joshua Stark* and *M. S. Griswold*, and oral argument by *Mr. Stark*. They contended, among other things, 1. That the commencement of a creditor's suit in chancery, giving a lien on the equitable assets of the debtor, was by the filing of the bill and service of the subpoena. *Utica Ins. Co. v. Power*, 3 Paige, 365; *Hayden v. Bucklin*, 9 id., 512; *Fitch v. Smith*, 10 id., 9; *Roberts v. R. R. Co.*, 25 Barb., 662; *Boynton v. Rawson*, 1 Clarke's Ch., 584; 2 Barb. Ch. Pr. (2d ed.), 158, and notes. 2. That in supplementary proceedings (which are a substitute for the creditor's suit), the service of the order for examination on the judgment debtor takes the place of the commencement of the suit under the old system, and gives the lien. *Lynch v. Johnson*, 48 N. Y., 27; *Nieuwankamp v. Ullman*, *ante*, p. 168. Personal property is, however, subject to levy on execution in favor of other creditors, who will thereby acquire a lien free from that of the supplementary proceedings, at any time before the appointment of a receiver therein. (*Van Alstyne v. Cook*, 25 N. Y., 489; *Brown v. Nichols*, 42 id., 26, 34; *Davenport v. Kelly*, id., 193, 199; *Voorhees v. Seymour*, 26 Barb., 569; and cases cited in Riddle's Sup. Pro., 162); and the reason is, that the commencement of supple-

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mentary proceedings is not a proceeding in court, and neither the order therefor, nor any other document that might serve as notice, is required to be filed until after a receiver is appointed. But as between two creditors separately pursuing such proceedings against a common debtor, he whose order for examination is first served has the prior lien. Riddle, 167. This rule in chancery (and by analogy in supplementary proceedings) was subject to the qualification, that if the creditor who first commenced his suit, abandoned it or lingered on the way before obtaining a specific lien, and permitted another creditor to outstrip him in legal diligence, he lost his priority. Riddle, 166, and cases there cited; *Myrick v. Selden*, 36 Barb., 15. 3. That the *bona fide* attempt at service which was sometimes permitted, in the creditor's chancery suit, to have the same effect as a regular service in giving priority, was not a defective or void service, but the best service practicable in the given case, followed by a regular service as soon as practicable. It meant leaving the subpoena at the defendant's dwelling when he was absent so that personal service could not be made. But when the sheriff has opportunity to serve the defendant personally, and fails solely by reason of his own carelessness and disregard of duty, this is not a *bona fide* attempt which should have the effect of actual service. 6 Duer, 703; 1 Clarke's Ch., 584; 1 Man. & Gr., 238. 4. That a motion in one action to set aside a judgment or order in another, or to reach funds held under orders in such other action, is an anomaly, and, if allowed, would involve the records and proceedings of the courts in the most serious confusion. *Rae v. Lawser*, 18 How. Pr., 23; 9 Abb. Pr., 380; *Bank of Kinderhook v. Jenison*, 15 How. Pr., 41.

LYON, J. A summary proceeding supplementary to execution under the statute (R. S., secs. 3028 to 3038, inclusive), instituted after the return of an execution unsatisfied, is a substitute for a creditor's bill in equity, and is governed by the

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same rules of law in respect to the rights and priorities of parties affected by the proceeding, which control the equitable action.

In creditors' suits, the general rule was that the creditor who, after filing his bill, obtained the first service of the subpoena upon the judgment debtor, thereby obtained a prior lien upon the equitable assets of such debtor.

It was also the rule that if the creditor proceeded with due diligence, a *bona fide* attempt to serve the process was equivalent to actual service thereof in respect to priority of right. These propositions are abundantly supported by the cases cited in the brief of counsel for the appellants.

In the present case no laches can be imputed to the appellants. They instituted their proceeding first, and prosecuted it with proper diligence before the commissioner until they obtained the appointment of a receiver. There would be no question of their right to the money in controversy, had not the sheriff failed to serve the judgment debtor with a correct copy of the order requiring him to appear before the commissioner for examination. The defect in the service was entirely accidental. Before it was discovered, the sheriff made affidavit to a proper service, and as soon as it was discovered, and before the time appointed in the order for the examination, the service was perfected, and the proceeding was thereafter diligently prosecuted to consummation. That there was a *bona fide* attempt to serve the order before *Mrs. Collier* instituted her supplementary proceedings, we cannot doubt.

As in a creditor's suit the filing of the bill and a *bona fide* attempt to serve the subpoena give the complainant priority of right to the equitable assets of the judgment debtor, so, under the circumstances of this case, the *bona fide* attempt to serve the order issued by the commissioner at the instance of the appellants must be held to confer upon them like priority of right over *Mrs. Collier*, although the order obtained by her was served before service of the appellant's order was perfected.

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But it is said that the *filing* of the creditor's bill, as well as the *bona fide* attempt to serve the subpoena, was essential to a *lis pendens*, while there was nothing on the records of the court to show the pendency of the appellants' proceeding. The filing of the bill and the attempted service were constructive notice of *lis pendens*, and bound all other creditors of the judgment debtor, whether they had actual notice of the suit or not. Here no question of constructive notice arises, for *Mrs. Collier* had actual notice of all the facts, and it is immaterial that the records of the court did not show that the appellants had commenced their proceeding against the judgment debtor.

Our conclusion is, that, under all of the circumstances of the case, *Mrs. Collier's* proceeding is inoperative to give her a prior lien on the equitable assets of the judgment debtor, as against the appellants, and that the latter are entitled to the money in the hands of the receiver, the amount being less than their judgment.

Although the foregoing views dispose of these appeals, we deem it our duty to indicate what we consider the correct practice in cases where different judgment creditors are prosecuting supplementary proceedings against the same debtor at the same time, whether such proceedings are pending before the same officer or different officers.

The statute (sections 3030 and 3031) gives the proceeding to any judgment creditor after the return of an execution unsatisfied, or in aid of an outstanding execution, without qualification or restriction, except as provided in section 3036. Hence, such a proceeding may be commenced by a creditor, although other proceedings by other creditors may be pending.

Section 3036 provides that, "before appointing any receiver, the judge shall ascertain, if practicable, by oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor; and if there be any, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in

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relation to such receivership, and no more than one such receiver shall be appointed."

This section also contemplates that different proceedings may be pending at the same time, the only restriction upon a junior proceeding being that creditors prosecuting prior proceedings shall be notified of the pendency thereof, and that but one receiver shall be appointed. Inasmuch as the receiver is an officer of the court, and subject at all times to the control of the court, and is required to give sufficient security for the faithful performance of his trust, it is of but little practical importance whether one is appointed in the first or subsequent proceeding. If an improper person be appointed, the court, on motion and proof of the fact, will remove him and appoint some suitable person. Yet we think it the proper practice, especially where the first proceeding is being diligently prosecuted, to suspend the appointment of a receiver in a subsequent proceeding, leaving the appointment to be made in the first. But the plaintiff in the junior proceeding should be allowed to proceed under section 3033, without regard to priorities.

Should a junior proceeding be instituted before the officer who issued the prior order for the examination of the judgment debtor, such examination should be first had in the prior proceeding, especially if the same is being diligently prosecuted. The same rule should be observed although the junior proceeding be instituted before another officer.

After a receiver has been appointed in the first proceeding, and has duly qualified as such, we see no objection to the appointment of the same receiver in all other proceedings against the same debtor. This is little more than a formal matter. The receiver should not be required, however, to give additional bond on such subsequent appointments, unless the court so order.

All of the proceedings being reported to the court, the parties can there litigate their respective rights, summarily, on

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motions duly served on all interested, and the court will adjudicate their rights, and determine the order in which the judgments shall be paid out of the funds in the hands of the receiver.

It only remains to determine a single question. The motion that Martin, the receiver, pay over the money in controversy to the appellants, was made in their action. It is claimed that this is irregular; that the motion should have been made in *Mrs. Collier's* action.

The objection is purely technical, and cannot prevail. The appellants and respondents are parties to both proceedings, and it is quite immaterial in which of them the motion is made. Martin, the custodian of the money, is under the control of the court, in respect thereto, and the money can be awarded to the party entitled to it by an order made in either case. We think, however, that it would have been more regular and orderly practice to have entitled the motion in both actions.

By the Court.—The orders appealed from are reversed, and the circuit court is directed to grant the motion of the appellants.

EVISTON vs. CRAMER and others.

LIBEL. (1) *What words prima facie libelous.* (2) *Pleading.*

1. A publication which charges that a person, while formerly holding the office of sealer of weights and measures and inspector of scales for a certain city, "tampered with" or "doctored" such weights, measures and scales, for the purpose of increasing the fees of his office, is *prima facie* libelous, as tending to bring the accused into public hatred or contempt.
2. On demurrer to a complaint in libel which alleges that defendant made such charges against plaintiff "falsely, wickedly and maliciously," the question whether the publication was *privileged* does not arise; as privilege does not extend to false charges made with improper motives or express malice.

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APPEAL from the County Court of *Milwaukee* County.

Action for libel. The newspaper article upon which the action was based, and which is set out in the complaint with matter of inducement, innuendoes, etc., is of considerable length, and will be omitted here, as its general purport is sufficiently stated in the opinion. Defendants demurred to the complaint as not stating a cause of action, and appealed from an order overruling their demurrer.

J. J. Orton, for the appellants.

For the respondent, the cause was submitted on the brief of *Cottrill, Cary & Hanson*.

COLE, J. In support of the demurrer it is insisted that the publication set out in the complaint is not upon its face libelous. In that view we are unable to concur. It seems to us that the obvious tendency of the publication was to disparage the character of the plaintiff and bring him into public ridicule and contempt. Undoubtedly the whole article should be considered together, in order to determine its character. If we so consider it, it charges or states, in substance, that the plaintiff, while acting as the official sealer of weights and measures, and as inspector of scales in and for the city of Milwaukee, made a practice of "tampering" with such weights and scales, for the purpose of increasing the fees of his office. This is the meaning or sense which a person would naturally attach to the language used in the article upon reading it. There are particular instances given of what is called in the article "tampering with" or "doctoring" the weights and scales of individuals by the plaintiff, while in office, for the purpose of increasing his fees.

Now, that such statements are *prima facie* prejudicial to plaintiff, calculated to degrade him in public estimation and bring him into public hatred and contempt, seems too plain for discussion. Nor are the injurious consequences of the publication neutralized or destroyed because the charges were

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made against the plaintiff after the expiration of his term of office, as "ex-sealer of weights and measures;" for surely to charge a man who has held an office that he performed the duties of such office from corrupt and dishonest motives, in order to obtain unlawful fees, necessarily tends to expose him to the scorn and contempt of every right-thinking person.

But it is further insisted in support of the demurrer, that the publication in question is privileged; that it was but a fair criticism by a public journal upon the conduct of a man while holding a public office; and that this was a matter of such public interest and concern as rendered the communication not actionable. Freedom of the press or exemption from censorship — the right to freely comment upon the character and official conduct of men holding public office, — is a most valuable right, and one without which popular governments cannot be maintained.

Says Judge Cooley upon this subject: "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the machinery of the law to prevent full discussion of political and other matters in which the public are concerned. With this end in view, not only must freedom of discussion be permitted, but there must be exemption afterwards from liability for any publication made in good faith, and in the belief in its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications, of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officers having powers of appointment. The same freedom of discussion should be allowed when the character and official conduct of one holding a public office is in question, and in all cases where the matter discussed is one of general public interest." Cooley on Torts, pp. 217, 218.

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In this case we are not called upon to determine how far a public journal may go in criticising or commenting on the official conduct and motives of men in office, inasmuch as the question whether the publication was privileged cannot arise on the demurrer; for it is alleged in the complaint, and for the purposes of this appeal must be assumed as true, that the defendants falsely, wickedly and maliciously published the article in question. Now we do not understand that privilege can be predicated upon a communication published with improper motives, or with express malice. Proof of express malice in the publication of any written communication renders such communication libelous in its character. Folkard's Starkie on Slander and Libel, ch. 11; *White v. Nicholls*, 3 Howard, U. S., 266; *Klinck v. Colby*, 46 N. Y., 427; *Noonan v. Orton*, 32 Wis., 106; *Cottrill v. Cramer*, 43 Wis., 242.

It follows from these views that the order of the county court must be affirmed.

By the Court. — Ordered affirmed.

DIEDRICH VS. THE NORTHWESTERN UNION RAILWAY COMPANY.

EVIDENCE. (1) *Admissions.* (2) *Testimony as to depreciation in value of property.* (3) *Exclusion of immaterial questions.* (4) *Rebuttal.*

VERDICT. (5) *Presumption that verdict includes interest.*

1. Under the circumstances of this case, *held*, that *the whole* of a certain statement, relied on by the respondent as admitted, must be considered as in evidence, or no part of it.
2. In an action for damages for the taking of part of plaintiff's block in a city for a railway, a witness for plaintiff, who had acted for several years as his agent in looking after the block, had paid taxes, given leases and collected rents thereon, received offers to purchase, and was personally acquainted with the block both before and after the taking, *held*, competent to testify not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block, by reason of the taking for railway purposes.

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3. A witness who had testified fully as to the actual value of the whole block both before and after the taking, was asked what a particular front of said block was worth before the road was constructed. *Held*, that there was no error in excluding the question.
4. Plaintiff having proven title to the land to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. *Held*, that there was no error in permitting plaintiff then to show that the breakwater and cribs were *not* built beyond the water's edge; the evidence being properly in rebuttal.
5. Where the jury, being instructed that plaintiff, if he recovered, was entitled to interest, found his damages at a certain sum, it must be presumed that this included the interest; and a judgment taken for a larger sum, including interest on that named in the verdict, is reversed, with directions to grant a new trial unless plaintiff remit the excess.

APPEAL from the Circuit Court for *Milwaukee* County.

Plaintiff appealed from an appraisal, made by commissioners duly appointed for that purpose, of a strip of land to which he claimed title, and which had been taken by defendant for its railroad track. On appeal from a former judgment of the circuit court herein, that judgment was reversed, and the cause remanded for a new trial. 42 Wis., 248. On the next trial, the evidence as to plaintiff's title, and upon the question whether the strip of land taken by defendant was originally a part of the shore, or was land made by plaintiff in the bed of the lake beyond low-water mark, was somewhat different from that given upon the former trial. The alleged errors in respect to the admission or rejection of evidence, and in other respects, will sufficiently appear from the opinion.

Plaintiff had a verdict and judgment; and defendant appealed from the judgment.

For the appellant, there was a brief by *E. Mariner*, and oral argument by *Mr. Mariner* and *L. S. Dixon*. They contended that it was incumbent on plaintiff to show, as a part of his case, that the land taken by defendant was within the limits of the tract included in his paper title; that if, after showing title to low-water mark, plaintiff might in the first

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instance rest upon a *presumption* that all the land now found above the water was included in his title, it was sufficient for defendant in the first instance to produce sufficient evidence of the land having in fact been made in the lake by plaintiff, to overcome that presumption; that the court might then, as a matter of discretion but *not of right*, permit plaintiff to introduce further evidence to make out his case by showing that the land in dispute was originally above the water; and that thereupon it was error to refuse defendant's offer of further rebutting evidence — an error by which defendant probably lost the case. Counsel also argued the other objections noticed in the opinion.

For the respondent, there was a brief by *Cotzhausen, Sylvester & Scheiber*, and oral argument by *Mr. Cotzhausen*.

COLE, J. 1. The first point relied on for a reversal of the judgment relates to the question of title. It is insisted on the part of the company, that in this proceeding to obtain compensation the plaintiff was bound to prove title to the particular strip of land taken, to be in himself; in other words, he must connect his paper title with the premises described in the award, or he could not recover. As the foundation of his title, the plaintiff put in evidence a patent from the United States to Morgan L. Martin of lot No. 2, bearing date December 27, 1842, under which he derived title through several mesne conveyances. Thereupon the plaintiff's counsel stated that it was admitted by counsel (referring to an admission on the former trial) that fractional lot No. 2 was entered August 1, 1835, by Peter Juneau, with duplicate certificate No. 16, and that he, before the making of the plat, assigned the certificate to Morgan L. Martin; that this entry was cancelled December 16, 1841; that on April 5, 1842, the lot was entered by William Powell with duplicate certificate No. 9399; that on the 21st of April, 1842, Powell assigned the certificate to Morgan L. Martin; and that Morgan L. Martin conveyed an

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undivided half of the lot to Solomon Juneau November 28, 1835.

To this statement, the counsel for the defendant said: "We will admit the entry August 1, 1835, by Peter Juneau, and the assignment of the certificate to Morgan L. Martin, and the conveyance of an undivided half by Martin to Solomon Juneau, November 28, 1835. I will admit what the facts are, and with regard to the other I will ascertain between now and to-morrow morning." The plaintiff's counsel then said: "You also admit the subsequent entry of Powell with duplicate certificate." To which the defendant's counsel replied: "That is a thing I don't know about," and here the matter rested.

The plaintiff further offered the assignment of the certificate by Powell to Martin, which was admitted in evidence, against the defendant's objection. Now it is said the court erred in admitting in evidence the certificate of entry by Powell, because it appeared that the United States had previously sold the land by Juneau's entry, which *prima facie* carried the title; consequently the subsequent entry, though followed by a patent, was void under the decision in *Wirth v. Branson*, 98 U. S., 118.

The former entry by Juneau appeared to be in evidence only from what was stated by plaintiff's counsel to be admitted on the other side. And in respect to that statement by way of admission, the whole of it must be either considered in evidence or no part of it; for, considering the manner the whole matter was dropped or disposed of on the trial, it would be a most unfair advantage to allow the defendant to have the benefit of the statement so far as it makes in his favor, but to reject whatever makes against him. The entire statement must be treated as being either in or entirely out of the case; and it is immaterial which view is taken of it, for the result will be the same. If the whole statement is regarded as an admission in the cause, then it plainly appears that

Juneau's entry was vacated and cancelled before Powell's was made. In that case the patent would be regular, and show title to the lot in Martin. On the other hand, if the statement or admission is deemed out of the case, then there is nothing to show that Powell's was not the only entry. Under the circumstances we have less reluctance in adopting this view, because on the former trial and hearing it was practically conceded that the plaintiff's title extended to the water's edge, and the decision as to riparian rights was based upon that assumption. 42 Wis., 248. The proof in the present case was sufficient to show title to the premises to be in the plaintiff.

2. The next error assigned relates to the admission, against defendant's objection, of certain questions asked the witness Ferdinand Kuehn. The witness had testified to the value of the block in controversy, both before and after the strip was taken by the company for the use of its road. The witness was asked and permitted to state, against the defendant's objection, whether the balance of the block, not taken by defendant, was increased or diminished in value by reason of the strip taken being used for the purpose of operating a railway. He answered that it was materially depreciated, stating the value of the block before the road was built and after. This question was then asked: "After that strip is taken out of that property, how much, in your judgment, is the balance of the property depreciated in value by reason of the strip being operated for the use of the railway, not by reason of the taking out of the strip, because that we have got already, but for the uses of the railway; how much does that depreciate the market value of the property?"

This question was objected to, on the ground that it had not been proven that the witness had such knowledge of the effect of operating a railway as would enable him to testify of the effect upon the value of the same.

We do not think this question so seriously objectionable that

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it should work a reversal of the judgment. As we understand the case, the testimony of Mr. Kuehn, as given on the former trial, was read on this trial by stipulation. Upon examining his evidence, it will be seen that he testified that he had acted for several years as the agent of the plaintiff in looking after this property. He had paid the taxes, given leases, collected rents, received offers to purchase, and was personally well acquainted with the block, both before and after the strip was taken by the company. He certainly had the most ample means to form an intelligent opinion, derived from an adequate knowledge of the situation and value of the property, to render him competent to answer the question, and came within the rule recognized or approved in *Whitman v. Boston & Maine Railroad*, 7 Allen, 313; *Whitney v. City of Boston*, 98 Mass., 312; *Boston & Maine Railroad v. Montgomery*, 119 Mass., 114.

In *Buffum v. N. Y. & Boston Railroad Co.*, 4 R. I., 121, the rule which was laid down by the trial court, and disapproved by the supreme court, was to the effect that any one living in the village where the land was situated at the time of the location of the road, and acquainted with the land, was competent to give an opinion as to the value of the land taken by the company, and as to the damage done by such location to the land of the claimant. It is unnecessary here to dissent from the doctrine of the Rhode Island case in order to sustain the admissibility of the testimony of Mr. Kuehn. He surely possessed the requisite qualification, and had sufficient knowledge on the subject, to answer the question. Evidence of this character is admitted from necessity; and there is no substantial objection to it where the witness shows that he is sufficiently informed to speak understandingly on the matter upon which he is called to testify. See *The M. & M. Railroad Co. v. Eble*, 3 Pin., 334; *Snyder v. The Western Union R. R. Co.*, 25 Wis., 60.

3. The next error assigned is, that the court improperly

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excluded certain questions asked the witness Winfield Smith. We do not think there was any error in the rulings of the court on this point. This witness was allowed to state fully, upon his examination, what, in his judgment, the strip taken by the company was worth, and what effect the taking of such strip for railroad purposes would have upon the value of the rest of the property.

It seems to us the witness was permitted to give his opinion upon every point connected with the issue, and surely he stated it fully as to the actual value of the property before and after the location of the road. The question asked him and excluded, as to what the Wisconsin street front of the property was worth before the railroad was constructed, was one which he must have necessarily considered and answered in giving his opinion in respect to the value of the property, as well before as after the taking. This element would enter into his estimate on that question.

4. The next error assigned is in allowing the witness Buck to testify whether the breakwater was constructed and the cribs built beyond the water's edge, or within it on the beach. This witness and others were examined by the plaintiff after the defense was closed. Testimony had been introduced on the part of the defense tending to prove that the plaintiff, in building the breakwater and cribs, had extended them beyond low-water mark, down into the lake. To meet this evidence, the plaintiff sought to show by this witness and others that this was not the fact; that those structures, when erected, did not extend beyond the water's edge, but were built upon the shore proper. In our view this was strictly rebutting testimony, and there was no error in admitting it.

The plaintiff, in his opening, had proven title to the land down to the natural shore of the lake, and his damages. He was not required to anticipate, in the first instance, the defense, and prove that he had not extended his embankment into the water. But when the defendant attempted to show

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that he had thus extended it, and that the premises sought to be condemned were really in the lake, the plaintiff had an undoubted right to meet and overcome that evidence if he could. A bare statement of the point is sufficient to vindicate the correctness of the ruling of the court below in admitting the evidence.

5. This brings us to a consideration of the verdict and judgment upon which a point is made. The court submitted four questions to the jury upon which to find specially: *first*, whether the strip of land in question was, in the spring or summer of 1856, a part of the shore of the lake, or whether it was outside of the shore proper and covered by water; *second*, the value of the strip taken, if it was found to be a part of the shore or dry land; *third*, the damage to the remainder of the plaintiff's property, if any, resulting from the taking of the strip for railroad purposes; *fourth*, the total damage to the plaintiff by reason of the taking and using the strip of land for the use of the railroad.

The record recites that the jury, after deliberating upon their verdict, returned into court and said that they had agreed upon their verdict, and submitted the same to the court. The court stated to the jury that the verdict was informal, and did not state the gross amount of plaintiff's damages; that if they allowed interest, it was their duty to calculate it, and not the duty of the court. The jury were then sent back to correct the verdict. Having retired again, the jury came into court with their verdict, finding that the strip was not outside the shore line; that its value was \$6,625; that the damages to the remainder of the property was \$7,609; and that the plaintiff's total damage, by reason of the taking and using of the strip for the purposes of the road, was \$14,234. Upon this verdict a judgment was rendered for the sum of \$19,891.22, damages and costs.

It is insisted that this judgment is wholly unwarranted by the verdict; and we think the point well taken. The plaintiff

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calculated interest on the total amount of damages from the time of the taking of the land, November 6, 1872, up to the entry of the judgment. He was undoubtedly entitled by law to interest on the damage he had sustained, and presumably the jury allowed it to him, under the direction of the court, in their finding. This inference is very strong from the facts stated in the record. At all events we must assume that the jury obeyed the direction of the court, and allowed the plaintiff interest on the amount of damages which they awarded him. If they did, then plainly the judgment is excessive. We have concluded to give the plaintiff the election to remit all above \$14,234, and interest on that amount from the date of the verdict, and have a judgment for the residue, or take a new trial. With our construction of the verdict, the present judgment is unwarranted.

By the Court.—The judgment is reversed, and the cause is remanded to the circuit court for further proceedings in accordance with this opinion.

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PLEADING. (1) *When demurrer reaches back.*

CORPORATIONS. (2) *Affidavit for change of venue.* (3) *Power of courts over corporations.* (4) *Conditions of power to fine member.* (5) *When void proceeding no bar to subsequent proceeding.* (6, 7) *Certain rules of a chamber of commerce, valid.* (8) *MANDAMUS to restore suspended member.*

1. A demurrer to the relator's answer to the return to an alternative *mandamus*, treated as a demurrer to the relation.
2. In an action against a corporation and its directors, a defendant director, who was also secretary of the corporation, made an affidavit of the prejudice of the judge, and asked for a change of the place of trial; stating in the affidavit that he made it, and asked the change, for him-

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- self and in behalf and at the request of all the other defendants; and they all, by their attorney, moved for the change. *Held*, sufficient.
3. The jurisdiction and duty of the courts of this state in exercising the visitatorial or superintending power of the state over its own corporations, to confine them within their franchises and correct and punish abuses thereof, asserted, and the modes of exercising such jurisdiction stated.
 4. The imposition of a fine upon a member of the defendant corporation, in his absence, without notice, formal complaint or trial, *held* a void proceeding.
 5. Where, after the member had been suspended for refusal to pay such fine, the proceeding was annulled by the directors, and the member restored, such void proceeding against him is no bar to a subsequent regular proceeding for the same offense.
 6. A rule of the defendant chamber of commerce prohibiting its members from "gathering in any public place in the vicinity of the Exchange Room," and "forming a market" for the purpose of making any trade or contract for the future delivery of grain or provisions, *before the time fixed for opening the Exchange Room* for general trading, or *after the time fixed for closing the same, daily, held* to be within the power conferred on the corporation by its charter (ch. 158, P. & L. Laws of 1867, amended by ch. 89 of 1877), and not to be unreasonable or an unlawful restraint upon trade, nor void for uncertainty.
 7. Under the present charter of said defendant, it may, by rule or by-law, confer upon the board of directors the power, and impose upon it the duty, of suspending a member convicted of a violation of the foregoing rule, who refuses to pay the fine imposed upon him therefor by the president in pursuance of another clause of the same rule. *State ex rel. Graham v. Chamber of Commerce*, 20 Wis., 63, approved but distinguished.
 8. The relator having been fairly tried, upon due notice, and in accordance with the rules of the corporation, and there being abundant proof against him tending to show that he had committed the offense charged, he will not be restored by *mandamus*. But whether the court, in such a case, will look into the testimony for any purpose, *quære*.

APPEAL from the County Court of *Milwaukee* County.

The board of directors of the defendant chamber of commerce having suspended the relator, a member of the chamber, from the privileges of membership, for nonpayment of a penalty imposed upon him for an alleged violation of one of the rules of the chamber, the relator sued out of the circuit court an alternative writ of *mandamus*, commanding the

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respondents to restore him to membership or show cause to the contrary.

On motion of the attorney for all the respondents, founded upon the affidavit of Langson, the secretary, and *ex officio* a director, the circuit court changed the place of trial to the county court, for the alleged prejudice of the circuit judge. Langson says, in the affidavit, that he makes it "on his own behalf, and on behalf and at the request of all the others, the above named respondents;" and "for himself, and for and on behalf and at the request of all the others, the above named respondents, prays that the place of trial of this, the said action, may be changed according to law."

When the case reached the county court, the relator moved that it be remanded to the circuit court, "on account of the irregular and improper removal of the said action, because no proper and legal application has been made therefor." The county court denied the motion. Thereupon the relator filed an amended relation; the respondents made return to the same; and the relator interposed an answer to such return. The respondents demurred generally to such answer, and specially to the various parts or paragraphs into which it is divided. The grounds of demurrer assigned (covering the whole pleading) are chiefly that the averments contained therein are argumentative and immaterial, and that the pleading contains matter of law alone.

The court sustained the demurrer, and gave judgment for the respondents, denying a peremptory *mandamus*, and dismissing the relation. The relator took this appeal from the judgment.

The history of the controversy between the relator and the chamber of commerce, out of which this action arose, as the same appears by the amended relation and the exhibits thereto attached, is substantially as follows:

The president of the chamber of commerce imposed upon the relator, a member of the chamber, a fine of five dollars for

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an alleged violation of one of the rules of the chamber. The relator refused to pay it. Thereupon the board of directors, on or about October 30, 1878, adopted a resolution suspending him from the privileges of membership until he should pay such fine.

The relator then sued out of the circuit court an alternative writ of *mandamus*, commanding the chamber of commerce and its board of directors to reinstate the relator, or show cause to the contrary. It is alleged, in the relation or petition for the writ, that the relator had no notice of the proceeding against him until after the fine had been imposed; "that no charges in writing have ever been exhibited or served upon him; that he has had no trial therefor; has seen or heard no testimony against him convicting him of any offense whatever; and he denies that he is guilty of any."

November 20, 1878, the board of directors rescinded the resolution suspending the relator, and restored him to the privileges of a member of the chamber. Afterwards the respondents in the alternative writ of *mandamus* made return thereto that they had thus restored him.

November 22, 1878, a formal charge for violating the same rule was preferred by the secretary against the relator, of which due notice was served upon him. A time was appointed for his trial before the board of directors, at which time he appeared before the board in person and by counsel. A trial was had, and witnesses on both sides were sworn, examined and cross-examined; and counsel for the relator argued the case to the board. It should be stated that the relator objected to the sufficiency of the complaint, and also insisted, as a bar to the proceedings, that the matter had once been adjudicated against him, and further, that there was no legal authority for the proceedings. The board overruled these several objections, and found the relator guilty of the offense charged. The president thereupon imposed upon him a fine of five dollars, and the board (nine members thereof being

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present and voting) unanimously adopted the following preamble and resolution:

"WHEREAS, *Charles Cuppel* has been found guilty in manner and form evidenced by the foregoing resolution, in pursuance of the power given under section 6 of rule 11, to inflict such discipline as the board of directors may determine,

"Resolved, That the said *Charles Cuppel* be and hereby is suspended from the privileges of membership of the chamber of commerce until he shall have paid the fine inflicted upon him by the president; this resolution to take effect immediately upon notice being served upon said *Charles Cuppel* of the infliction of said fine and the passage of this resolution, and upon his neglect or refusal forthwith to pay said fine."

The foregoing proceedings by and before the board were had November 29, 1878, and on the day following due notice in writing of such proceedings, with demand of payment of the fine, signed by the secretary, was served upon the relator. It does not appear that the fine was paid. It is a fair inference from the allegations in the relation, that it was not.

From the time of such demand the relator has been excluded from the rooms of the chamber of commerce, and from the privileges of a member thereof; and he brought this action for the purpose of compelling the respondents to restore him to those privileges.

The confused state of the record, and the great mass of exhibits attached to the amended relation, and constituting portions of it, have rendered it extremely difficult to ascertain the precise facts alleged by the relator; but it is believed that the foregoing is a correct statement of all the facts alleged by him which are material to the case.

The return or answer of the respondents to the relation, and the reply of the relator thereto, are sufficiently noticed in the opinion, and it is not necessary to state their contents here.

J. J. Orton, for the appellant:

1. The rule for the alleged violation of which the relator was

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fined, is void. (1) When a corporation is empowered by its charter to make by-laws in certain cases and for certain purposes specified, its power of legislation is limited to those cases and purposes. A. & A. on Corp., §§ 111, 325. Respondent's charter empowers it only "to make such rules and by-laws . . . as may seem proper or necessary for the good government of the corporation." But the rule in question has nothing to do with the good government of the corporation, and is therefore *ultra vires*. *Rex v. Cutbush*, 4 Burr., 2204; *Rex v. Ginever*, 6 Term, 735-6; *Beaty v. Knowler's Lessee*, 4 Peters, 152-167; *Jansen v. Ostrander*, 1 Cow., 686; Field on Corp., § 295. (2) By-laws must be reasonable, and not nugatory, unequal, vexatious, oppressive or manifestly detrimental to the interests of the corporation. *Regina v. Saddlers' Co.*, 3 El. & El., 43; *People ex rel. Muir v. Throop*, 12 Wend., 183, 186; Grant on Corp., 80, 81. Whether they are reasonable and consistent with law, is a question solely for the court. 12 Wend., 186; 3 Pick., 462; *Rex v. Spencer*, 3 Burr., 1839; 10 Wend., 100; 5 Cow., 465; A. & A., §§ 347, 357, and cases there cited; Field, § 296. Counsel argued at length that the rule in question was unreasonable and oppressive. (3) The rule is void because in restraint of trade. A. & A., §§ 335-9, and cases there cited; Grant on Corp., 83, 88, and cases; Field, § 297, and cases; *Dunham v. Trustees*, 5 Cow., 462; *Adley v. Whitstable Co.*, 17 Ves., 315; *Adley v. Reeves*, 2 M. & S., 53; *King v. Steward*, 8 Term, 352; *Hesketh v. Braddeck*, 3 Burr., 1847. (4) A by-law is void which enacts a *penalty upon a penalty*—as, in this case, fine and suspension. A. & A., § 363, and cases there cited; *Adley v. Reeves*, 2 M. & S., 60; 17 Ves., 304; Wills, 390. A by-law cannot be enforced by disfranchisement; and suspension is disfranchisement *pro tanto*. A. & A., §§ 362-3; 2 Kent, 298. Minor offenses ought to be punished by penalties imposed, and not by disfranchisement. 2 Potter on Corp., §§ 726, 728; 1 id., § 82, and cases there cited. An action of debt to enforce

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the fine was the proper remedy. Charter, sec. 12. (5) This by-law contravenes the right which the law gives every citizen to trade in all public places in the state, and is therefore void as contrary to the law of the land. Field, § 301, and cases there cited; 24 Barb., 575. (6) The power of *amotion* belongs to the corporation only, and cannot be delegated to the board of directors. *Rex v. Richardson*, 1 Burr., 539; *State ex rel. Graham v. Chamber of Commerce*, 20 Wis., 63, 73; *Dickenson v. Chamber of Commerce*, 29 id., 45. 2. The facts in evidence do not show that the relator has violated the rule in question. 3. The matter had been once adjudicated, and could not be tried again. 4. The county court had no jurisdiction of the cause, only one of the defendants having made the affidavit and petition for a change of venue. *Wolcott v. Wolcott*, 32 Wis., 63; *Bank v. Tallman*, 15 id., 92-94. 5. The charter requires the board of directors to be composed of the president, vice-presidents, secretary and nine directors; and there were only six votes for the suspension — not a majority.

N. J. Emmons and *L. S. Dixon*, for the respondents:

1. The venue was properly changed. R. S., sec. 2625; *Bank of Scotland v. Tallman*, 15 Wis., 92; *Wolcott v. Wolcott*, 32 id., 63. 2. The first proceedings to punish the relator having been abandoned, and being confessedly void, no plea of former conviction can be grounded thereon. *People v. Barrett*, 1 Johns., 66; Wells' Res. Adjudicata, ch. XXVI, p. 318. 3. If the rule was valid, the court cannot review the evidence as to the relator's guilt. *Black and White Smiths' Society v. Vandyke*, 2 Whart., 309; *Comm. ex rel. v. Pike Ben. Society*, 8 W. & S., 247; *Society for the Visitation, etc., v. Comm. ex rel. Meyer*, 52 Pa. St., 125; *Rex v. Griffiths*, 5 Barn. & Ald., 731 (7 E. C. L., 243); *Gregg v. Mass. Med. Society*, 111 Mass., 185; *People ex rel. Thacher v. N. Y. Com. Association*, 18 Abb. Pr., 271; High on Ext. Rem., §§ 290, 292, 301, 305; A. & A. on Corp., § 693, and numerous cases cited in note 6. 4. The rule is valid, being authorized by the terms of the charter, ap-

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propriate to the general objects of the corporation, and not forbidden by any general principle of law. Limited and partial restraints of trade, proceeding from good motives and considerations, are sanctioned by all courts. *Kellogg v. Lar-kin*, 3 Chand., 133; *Mitchel v. Reynolds*, 1 P. Wms., 181; *Pierce v. Fuller*, 8 Mass., 223; *Alger v. Thacher*, 19 Pick., 51; *Chappel v. Brockway*, 21 Wend., 158; *King v. Company of Free Fishermen*, 8 Durnf. & E., 352, 356; *King v. Company of Free Fishers, etc.*, 7 East, 353; *Adley v. Whitstable Co.*, 17 Ves., 315; *Adley v. Reeves*, 2 M. & S., 52, 58; *Adley v. Whitstable Co.*, 19 Ves., 304. So far as by-laws in restraint of trade are concerned, the rulings and dicta against them have been confined to *municipal* corporations. A. & A. on Corp. (10th ed.), §§ 335-40; Dillon on M. C., §§ 258-64, and notes; Field on Corp., § 297, and notes; *Barling v. West*, 29 Wis., 307; *Hayes v. Appleton*, 24 id., 542; *Clason v. Milwaukee*, 30 id., 316; *King v. Tupperden*, 3 East, 186; *King v. Coopers' Co., etc.*, 7 Term, 543; *Butchers' Co. v. Morey*, 1 H. Bl., 370. As to private corporations, counsel cited A. & A., § 357; *Philips v. Bury*, 2 Term, 351-2; *People ex rel. Gray v. Medical Society*, 24 Barb., 570, 579; *People ex rel. Bartlett v. Medical Society*, 32 N. Y., 187; *People ex rel. Corrigan v. Y. M. Father Matthew Ben. Society*, 65 Barb., 357; *People ex rel. Godwin v. American Institute*, 44 How. Pr., 468; *People ex rel. Schmitt v. St. Franciscus Ben. Soc.*, 24 id., 216; *Parkinson's Case*, Carthew, 92; *Barrows v. Medical Society*, 12 Cush., 402; *Franklin Ben. Association v. Commonwealth*, 10 Barr, 357; *Society, etc., v. Commonwealth*, 52 Pa. St., 125-32; *People ex rel. Thacher v. N. Y. Com. Association*, 18 Abb. Pr., 271; *People ex rel. Page v. Board of Trade*, 45 Ill., 112; *Dickenson v. Chamber of Com.*, 29 Wis., 45. These cases cover the objection that the by-law is *unreasonable*, as well as that founded upon its being in restraint of trade. Counsel further cited *White v. Brownell*, 3 Abb. Pr., N. S., 318, where the body of which the plaintiff was a member was un-

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incorporated, and its constitution was treated as a *contract*; and they contended that the same principles were applicable to a corporation like this chamber of commerce, whose charter does not create any rights or privileges as to admission to membership, uncontrolled by the mere discretion of the association. See *White v. Brownell*, on appeal, 4 Abb. Pr., N. S., 162, per DALY, J. See also *People ex rel. Rice v. Board of Trade*, 80 Ill., 134. 5. If the by-law is valid, then, even if there were irregularities in the proceedings for suspension of the relator, the *mandamus* will be denied; it being apparent that he has been guilty of a violation of duty, and might again be expelled or suspended, in a regular manner. *Ex parte Paine*, 1 Hill, 665; *People v. Med. Society*, 32 N. Y., 187; Shepard's Notes to *Fish v. Weatherwax*, 2 Johns. Cas., 217-58; Buller's N. P., 207; *King v. Mayor, etc.*, 2 Durnf. & E., 177; *King v. Mayor, etc.*, 1 Dowl. & R., 389; *Rex v. Fetherstonhaugh*, cited 2 Burr., 530; *Meister v. Anshei Chesed Cong.* (Sup. Ct. of Mich.), 6 Rep., 687. 6. The case is not one in which the court has jurisdiction to interfere by *mandamus*. The remedy is confined to public corporations or those in which the right to membership is gained by heritage, or qualification prescribed by law; and jurisdiction cannot properly be assumed over the discipline of a purely voluntary corporate body. *People ex rel. Rice v. Board of Trade*, 80 Ill., 134; *Fisher v. Board of Trade*, id., 85; *Baxter v. Board of Trade*, 83 id., 146; *Sturges v. Board of Trade*, 86 id., 441. The jurisdiction of the board of directors of the respondent chamber in the discipline of its members is *visitorial* in its nature (2 Potter on Corp., §§ 741-6), and the sentence of the visitor on subjects within his jurisdiction is final, and cannot be reviewed by the courts. *A. & A. on Corp.*, § 693, and ch. XIX generally; id., § 704; *Philips v. Bury*, 2 Durnf. & E., 246; *Allen v. McKeen*, 1 Sumn., 277-296; *Amherst Academy v. Cowles*, 6 Pick., 427; *Dartmouth College v. Woodward*, 4 Wheat., 518; *Att'y Gen. v. Foundling Hospital*, 2 Ves., 41.

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In a supplemental brief, respondents' counsel reviewed the cases cited for the appellant as to the invalidity of the by-law in question, and contended that they were all inapplicable or tended to support such by-law. To the point that there was both a fine *and* suspension, they answered (1 that the by-law provided for both, and there is no authority which pronounces a by-law invalid merely because it provides a double punishment; and (2), that while the fine could doubtless be collected by a common-law action, yet, under sec. 7 of the charter, a refusal to pay the fine might be treated as "conduct meriting suspension," as was in fact done in this case. To the point that the suspension was not by an affirmative vote of a majority of the whole board, they answered that, in the absence of any provision in the charter on the subject, a majority of the board were a quorum, and a majority of that quorum was sufficient to convict. A. & A., §§ 501-5.

Mr. Orton, in reply, argued, among other things, that in this country the visitorial power, in respect to corporations generally, whether public or private, is in the state, and is exercised through the courts, and in cases like the present is exercised by means of the writ of *mandamus*. *Potter on Corp.*, §§ 741, 744; *State ex rel. Graham v. Chamber of Com.*, 20 Wis., 73.

LYON, J. We think the place of trial was regularly changed from the circuit to the county court, and that the latter court had jurisdiction of the case. *Langson*, who made the affidavit for such change, was the secretary and a director of the chamber of commerce, and a defendant in the action. He swears in such affidavit that he makes the same, and prays for the change, on behalf and at the request of all the defendants; and all of them moved, by their attorney, for such change. The case is clearly within the rule of *Wolcott v. Wolcott*, 32 Wis., 63, and *Rupp v. Swineford*, 40 Wis., 28.

The visitorial or superintending power of the state over

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corporations created by the legislature will always be exercised, in proper cases, through the medium of the courts of the state, to keep those corporations within the limits of their lawful powers, and to correct and punish abuses of their franchises. To this end the courts will issue writs of *quo warranto*, *mandamus* or injunction, as the exigencies of the particular case may require; will inquire into the grievance complained of, and, if the same is found to exist, will apply such remedy as the law prescribes. Every corporation of the state, whether public or private, civil or municipal, is subject to this superintending control, although in its exercise different rules may be applied to different classes of corporations. The cases in this court are very numerous in which such control has been sanctioned and exercised. In one of them, this court sent its peremptory mandate to the chamber of commerce of Milwaukee, the principal respondent in this action, commanding the restoration of a member who had been unlawfully suspended. *State ex rel. Graham v. The Chamber of Commerce*, 20 Wis., 63. In another case, it adjudicated the validity of a by-law of the chamber, for the violation of which a member was threatened with expulsion or suspension. *Dickenson v. The Chamber of Commerce*, 29 Wis., 45.

In the light of these judgments we cannot accept the doctrine, which seems to have received the sanction of the supreme court of Illinois in *People ex rel. Rice v. The Board of Trade of Chicago*, 80 Ill., 134, that the power of such corporations to enact by-laws is unlimited, and that the courts will not interfere with the enforcement of any by-law thus enacted. The case seems in conflict with earlier decisions of that court, and we are not aware that the court has reasserted any such doctrine, although it has since considered several cases involving the legality of the proceedings of the same board of trade. See *Fisher v. The Board of Trade of Chicago*, 80 Ill., 84; *Sturges v. The Same*, 86 Ill., 441; *Baxter v. The Same*, 83 Ill., 146. True, these were equity cases, in which the respective

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complainants sought to restrain the board from expelling them, or to compel it to restore them after expulsion; yet the doctrine of *The People ex rel. Rice v. The Board of Trade, supra*, is referred to hypothetically in the opinions of the court, and no mention whatever is made of that case. Whether that learned and able court adhere to that doctrine or not, we are unable, as at present advised, to adopt it as the law of this state.

We now proceed to an examination of the record before us. The return of the respondents to the alternative writ of *mandamus*, and the answer of the relator to such return, have been carefully examined, and we are unable to find in either pleading an averment of any material fact which is not sufficiently stated in the amended relation. We think both of them might safely be expunged from the case without detriment to either party.

Under a familiar rule of law, a demurrer to the return to a *mandamus* reaches back to the relation. *State ex rel. Cothren v. Lean*, 9 Wis., 279; *State ex rel. Burns v. Supervisors, etc.*, 34 Wis., 169. This is on the principle that, notwithstanding the defect of the pleading demurred to, the court will give judgment against the party whose pleading was first defective in substance. *Babb v. Mackey*, 10 Wis., 371; *Ferson v. Drew*, 19 Wis., 225, and cases cited. Hence, the demurrer to the relator's answer reaches back and must be treated as a demurrer to the amended relation. The county court evidently so considered it, and must have held that the relation fails to show facts which, if true, entitle the relator to a *mandamus*. Otherwise that court would not have given final judgment against the relator on the demurrer.

The question to be determined is, therefore: Are sufficient facts stated in the amended relation to show that the relator is entitled to be reinstated as a member of the chamber of commerce, from the privileges of which the board of directors has suspended him?

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To determine this question, it is not necessary to define the precise limits of the power of the court in the exercise of its control over corporations, or to lay down any general rules as to how far the courts will go in reviewing corporate action. This will not be attempted. It is sufficient for the purpose of this case to say, that, if it appears from the relation that the relator was duly notified of the charge preferred against him, and had a fair trial before the board of directors; if the testimony tended to prove the charge; if the former proceeding against him for the same offense is a nullity; and if the rule or by-law under which he was prosecuted, convicted and suspended from membership, is a valid regulation of the chamber—then the relation fails to show that the relator is entitled to be reinstated.

1. The relator had due and timely notice of the charge against him, and of the time appointed for his trial. He appeared before the board of directors in person and by counsel, cross-examined the witnesses called by the prosecution, produced witnesses in his own behalf, who were sworn and testified, and his counsel argued his case to the board. It satisfactorily appears that he was tried fairly, and in all respects in accordance with the rules of the chamber.

2. The testimony is made a part of the relation, and there was abundant proof tending to show that the relator had committed the offense charged against him. He was convicted of the offense, and the penalty imposed was that prescribed by the rules.

It should be observed that it is doubtful, to say the least, whether in such a case the court will look into the testimony for any purpose. But the exigencies of this case do not require a determination of that question.

3. The relation shows that the first proceeding against the relator was without notice, formal complaint or trial, and was had in his absence. Such a proceeding is not only irregular but is utterly void. Moreover, the board of directors, when

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so advised, annulled the whole proceeding and restored the relator to membership.

Should a magistrate, on being told that a person had committed an assault and battery, enter in his docket a judgment convicting such person of that offense, and imposing a fine upon him therefor, without formal complaint, process, arrest, appearance or trial, such judgment would be a nullity, and would constitute no bar to a regular prosecution for the offense. The same principle applies here. The first void proceeding against the relator is no bar to a subsequent regular proceeding for the same offense.

4. The only remaining question to be considered is, whether the rule of the chamber under which the proceedings were had against the relator, is valid. The rule reads as follows: "Members of the chamber of commerce are hereby prohibited from gathering in any public place, in the vicinity of the exchange room, and forming a market for the purpose of making any trade or contract for the future delivery of grain or provisions, *before the time fixed* for opening the exchange room for general trading, or *after the time fixed for closing the same*, daily; and any member who shall make any trade or contract in the manner herein prohibited, shall be deemed to have violated this rule, and he may, therefor, be fined by the president in a sum not exceeding five dollars for each and every such offense, and shall be liable to such additional discipline as the board of directors may determine; and any member refusing or neglecting to pay any such fine shall be suspended by the board of directors from all privileges of the association during the time that such fine shall remain unpaid."

The more material objections urged against the validity of this rule (and the only objections which it is deemed necessary to consider) are: *first*, that it is not competent for the chamber to restrict the right of its members to assemble and make contracts for the future delivery of grain or provisions

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when and where they choose; *second*, that the chamber cannot lawfully delegate the power of suspension or expulsion to the board of directors; and *third*, that the rule is void for uncertainty, in that it fails to define what is a "public place in the vicinity of the exchange room," and what constitutes "forming a market."

The respondent chamber of commerce, although theretofore organized under chapter 132 of the General Laws of 1858 (R. S. 1858, 490), was specially incorporated by chapter 158, Private and Local Laws of 1867. That act was amended by chapter 39, Laws of 1877. The charter, as contained in these acts, confers upon the chamber power to make such rules and by-laws, and to alter the same from time to time, "as may seem proper and necessary for the good government of the corporation hereby created; such rules and by-laws not to contravene the laws of this state or of the United States." Section 1, ch. 158. Section 6 of that chapter provides that "the said corporation shall have power to admit and to suspend or expel members, as it may see fit, *in manner to be prescribed by the rules and by-laws.*" And section 9, as amended by the act of 1877, contains the following: "Said corporation shall elect, in the same manner and at the same time prescribed for the election of other officers, nine directors, who, together with the *ex officio* members of the board hereinafter designated, in addition to the performance of such other duties as may be assigned to them in the rules and by-laws, shall investigate complaints against members, and when sitting in such capacity shall have power to examine witnesses under oath, to be administered by the presiding member; and when, in their judgment, any member has been proven guilty of conduct meriting suspension or expulsion, they may suspend or expel such member." The *ex officio* members of the board thereafter designated are the president, vice presidents (of whom there are two), and secretary.

The objection that the chamber has no power to make a

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rule or by-law which prohibits its members from meeting when and where they please, and then and there making contracts for the future delivery of grain or provisions, is based upon the alleged positions, that such a rule or by-law is not for the good government of the chamber, and, therefore, *ultra vires*; and further, that the same is unnecessary and unreasonable, and operates as an unlawful restraint upon trade.

We cannot concur in these positions. Regarding the rule under consideration merely as a police regulation, enacted for the purpose of affording the members of the chamber of commerce free and convenient ingress and egress to and from the daily meetings of the chamber, and to prevent the confusion and disturbance in the public places near its exchange room which might result from the unlimited right of the members to trade in those places, we could not hold that the rule in that behalf may not be proper for the good government of the chamber, or that it imposes an unlawful restraint upon trade, or is unreasonable or unnecessary. But it is probable that the rule was enacted for other than mere police purposes. It may be that experience had shown that the unrestricted right of the members to form a market at the times and in the places specified in the rule, for the purpose of making the class of contracts therein mentioned, tended to promote irregular transactions by persons not members of the chamber and not amenable to its rules.

In the preamble to its rules the chamber declares its object to be, "to promote just and equitable principles in trade, to correct abuses, to establish and maintain uniformity in the commercial usages of the city, to acquire, preserve and disseminate valuable business information, and to support such regulations and measures as may advance the mercantile and manufacturing interests of the city of Milwaukee." These are laudable objects, and we cannot say that none of them are promoted by the rule under consideration.

We may conclude our remarks on this subject with a single

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additional suggestion. The testimony taken before the board of directors on the trial of the relator is made a part of the relation. On that trial the relator gave evidence tending to prove that nearly all of the time contracts mentioned in the rule are wager or gambling contracts, and therefore void. If that proposition were proved, it would be difficult to hold that a rule which operates as a restraint upon the making of such contracts is an unlawful restraint upon trade. In that case, if it is a restraint, the rule and the statute are in entire harmony.

The next objection to the rule is, that the chamber cannot lawfully delegate to its board of directors the power of suspension or expulsion. The learned counsel for the relator relies upon the case of *The State ex rel. Graham v. The Chamber of Commerce of Milwaukee*, 20 Wis., 63, to support this objection. It was there held that the power of expulsion was in the body of corporators, and could not, under the law as it then stood, be delegated to the board of directors. That case arose under chapter 132, Laws of 1858, before cited, which provided merely that corporations organized under it "shall have the right to admit as members such persons as they may see fit, and expel any members as they may see fit." Sec. 2. The ruling was undoubtedly correct; but the law has since been changed, and the statutes above cited confer upon the board of directors the power of suspension or expulsion in proper cases (sec. 9, *supra*), and also upon the chamber power to prescribe rules and regulations for admitting and expelling members (sec. 6). The statute also gives the chamber very extensive authority in respect to the enactment of rules and by-laws, and the conferring of powers thereby upon the board of directors.

As the law now is, we do not doubt that the rule under consideration legally confers upon such board the power, and imposes upon it the duty, of suspending a member convicted under it, who refuses to pay the fine imposed upon him by the president.

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The last objection is, that the rule is void for uncertainty. We do not think so. We think the language of the rule is reasonably explicit, and that there should be no difficulty in understanding what is a "public place in the vicinity of the exchange room," or what acts constitute the forming of a market there, within the meaning of the rule. The rule doubtless means a place in that vicinity public to all the members of the chamber, and includes the hall or passage way leading from the street to the exchange room. "Forming a market" evidently means conducting negotiations and making contracts of sale. Perhaps the rule might have been better drawn, but its meaning is as clear as that of many penal statutes which the courts constantly enforce.

Upon the whole case, we conclude that the relation fails to state facts showing that the relator was unlawfully suspended.

The judgment of the county court denying a peremptory *mandamus* and dismissing the relation, must be affirmed.

By the Court. — Judgment affirmed.

KEMP VS. SEELY.

ACTION *de bonis asportatis*. (1) *Pleading and evidence as to plaintiff's title.*
(2) *Proper form of finding.*

1. In an action *de bonis asportatis*, where the answer is merely a general denial, proof of plaintiff's possession at the time of the taking is *prima facie* evidence of his title, and defendant cannot thereupon, by evidence, question the *bona fides* of plaintiff's purchase of the property from his vendor.
2. A finding in such a case, that "defendant did not take, carry away nor convert the property of the plaintiff," held insufficient, because it does not determine the question of the taking, nor distinctly determine the question of title, if that was in issue.

APPEAL from the County Court of Dodge County.

Plaintiff appealed from a judgment in favor of the defendant. The case is sufficiently stated in the opinion.

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The cause was submitted on the brief of *F. Hamilton* and *E. Elwell*, for the appellant, and that of *J. W. Seely*, with *J. B. Hayes*, of counsel, for the respondent.

ORTON, J. This is an action *de bonis asportatis*, and the answer a general denial, which is tantamount to the general issue of not guilty. On such an issue, proof that the plaintiff was in possession of the property when taken was *prima facie* evidence of his title, and the further evidence given of his title was unnecessary; and the ruling of the county court admitting testimony, against the objection of the appellant, as to the *bona fides* of his purchase of the property from his vendor, Lemon, was clearly erroneous, because the respondent had not shown by his pleadings any right to question it. *Hutchinson et al. v. Lord*, 1 Wis., 286; *Rogan v. Perry*, 6 Wis., 194; *Stanton v. Kirsch*, id., 338.

The testimony given by the plaintiff and his witnesses was clear and positive that the respondent took the property from the possession of the appellant, and was corroborated substantially by the witnesses of the respondent; and the testimony of the respondent himself, consisting mainly of specific and technical denials, to say the least of it, was very evasive, if not contradictory. The findings of the court were:

"1. That the defendant did not take, carry away, nor convert, nor in any manner meddle or interfere with, the property of the plaintiff.

"2. That no trespass was committed by the defendant upon the property of the plaintiff, as alleged in the plaintiff's complaint."

This last pretended finding of fact is a mere conclusion of law, which leaves the first finding alone as authority for the judgment.

The taking and carrying away of the property is qualified and restricted in this finding by the words "the property of the plaintiff." What does this finding mean? Does it mean

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that the defendant *did take* the property from the plaintiff, but it was *not his* property, and belonged to some other person? This would seem to be the proper construction and logical inference; for it is a clear negative pregnant, in which the denial of one proposition is the affirmation of another.

In this view the court found the issue of title, which is not in the case, against the defendant, and the issue of the taking, which is in the case, in his favor. Or, in another view, the issue of the taking is not found *positively* at all, but only hypothetically and argumentatively, and therefore not found at all as an independent fact. That is to say, it is found that the defendant did not take the property of the plaintiff because it was not the property of the plaintiff. If the issue of title was in the case at all, then it should have been found as a *distinct* issue. The issue of the taking was clearly in the case, and should have been distinctly and specifically found without qualification.

The findings, therefore, if not equivocal and evasive, are too uncertain and defective to warrant the conclusions of law and the judgment. The judgment of the county court is reversed, with costs, and because it appears that there was a misapprehension at least, if not an evasion, of the real issue, both on the trial and in the findings, the cause is remanded to the county court for a new trial therein.

By the Court. — So ordered.

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ABATEMENT OF ACTION.

1. After an ordinance of a county board of supervisors has taken effect, abolishing an existing town, attaching different parts of its territory to other towns, and transferring to one of the latter a judgment in favor of the abolished town, an appeal from such judgment cannot be taken in the name of the former town, or by its attorney, in the absence of any provision to that effect in the ordinance; but, though the action does not finally abate (sec. 2300, R. S.), the town to which the judgment has been transferred must be substituted as plaintiff before any further proceedings can be had; and an appeal taken in violation of this rule is dismissed as giving no jurisdiction to this court. *Sup'rs of La Pointe v. O'Malley et al.*, 332
2. Sec. 2301, R. S., which provides that, in case of a transfer of interest, the action may be continued by the original party, etc., has no application to a case where the original sole plaintiff has ceased to exist. *Ibid.*
3. Nonjoinder of a proper defendant can be taken advantage of only by answer in abatement. *Newhall-House Stock Co. v. F. & P. M. R'y Co.*, 516

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1. When separate appeals in the same case are pending here, this court will look into the whole record for the purpose of disposing of them. *Kopmeier v. Larkin, imp.*, 598
2. A printed case of 255 pp. and a brief for appellant of 134 pp., in this case, being constructed in gross disregard of Rules 8 and 9 of this court, the clerk is directed to allow appellant, in the taxation of costs, for only 50 pp. of case and 25 pp. of brief. *Southmayd v. Watertown F. I. Co.*, 517

(B.) From County to Circuit Court.

1. An order for service of notice of an appeal from the county court to the circuit court, directing in terms that such service be "upon the adverse party," without naming him, followed by service upon the proper party, is good (*Nelson v. Clongland*, 15 Wis., 392); and where the administrators of an estate are the adverse parties, an order for service upon certain persons by name, followed by service upon them, would also be good, if such persons were in fact the administrators. *Kasson et al. v. Estate of Brocker*, 79
2. Whether, where there are several administrators, an order for service upon one of them only by name, would be sufficient, is not here determined. *Ibid.*
3. Where there has been no sufficient service of notice of appeal, the appearance of the adverse parties in the circuit court, and their motion to dismiss the appeal based in part on other than jurisdictional grounds, is a waiver of all defects in the service. *Ibid.*
4. The fact that "there was no evidence that notice of the appeal was given," at the time when a motion to dismiss the appeal was made, is not jurisdictional; and its assignment as ground of dismissal is an implied admission that the notice was in fact served. *Ibid.*
5. An appeal from an order of the county court disallowing a claim against an estate should not be dismissed on the ground that no notice of the appeal has been served on the county judge or filed in his office; the statute not requiring any such service or filing. *Ibid.*

6. Where, on appeal from the disallowance of a claim of partners in their firm name, the appeal bond is executed in the firm name, the presumption, in the absence of all proof, is, that it was so executed as to bind both partners, and the mode of execution is approved. *Ibid.*
 7. Such a bond running to "A., B. and C., administrators," etc., satisfies the statute requiring it to run to the adverse parties, where the persons named were in fact the administrators; and although the words "administrators," etc., might in some contracts be held mere *descriptio personarum*, they could not be so held in an action upon such a bond. *Ibid.*
 8. If the bond on appeal from the probate court substantially covers the provisions of the statute, and secures to the appellee all that the law designed for him, it is sufficient, although it does not follow the language of the statute. *Ibid.*
 9. The condition of the bond required by the statute is, that appellant "shall prosecute his appeal to effect, and pay all damages and costs which may be awarded against him." R. S. 1858, ch. 101, sec. 21. The condition of the bond here in question is, that appellants will "pay all damages and costs that may be awarded against them, in case they shall fail to obtain a reversal of the decision (describing it), and that they will diligently prosecute such appeal, without any fraud or other delay." *Held*, sufficient. *Ibid.*
 10. After more than sixty days from the making of an order by a county court allowing an account against an intestate estate, A. asked leave to appeal from the order, stating facts to explain the delay, and also stating that he was the sole heir-at-law of the intestate, as the sole ground of his claim to be aggrieved by the order. On the hearing of the petition, it appeared that A. was not, but one N. was, the sole heir-at-law of the intestate; but the county judge, at the close of the hearing, announced orally that he would grant the prayer of the petition. Afterwards A. filed what purported to be an assignment to him of N.'s interest in the estate, dated some days before the verification of A.'s petition, but not referred to therein, nor used at the hearing; and the adverse party had no opportunity to contest the validity or effect of such alleged assignment. The circuit court subsequently made an order allowing A. to appeal. *Held*, error: A. having shown no right to appeal, at the hearing of his petition, and having been guilty of bad faith and laches. *Downer, Adm'r, v. Howard*, 476
- (C.) *From Justice's Court.* See COSTS, 10.
1. Since sec. 229, ch. 88, R. S. 1849, was superseded by sec. 259, ch. 3, title 2 of the Code of Procedure of 1853 (R. S. 1853, ch. 123, sec. 203; R. S. 1878, sec. 3756), if an appeal from a justice's judgment be dismissed by the circuit court at the instance of the appellant, while the judgment of that court may go against the surety in the statutory undertaking to stay proceedings on the justice's judgment pending the appeal (as well as against the appellant), yet the surety is not liable on the judgment of the justice. *Sengpeil v. Spang*, 28
 2. The circuit court cannot take jurisdiction of an appeal from a justice's court without the statutory affidavit, made by the appellant or his agent (R. S., sec. 3754); and a substantial defect in the affidavit cannot, therefore, be waived or amended in that court. *Wright v. Fallon*, 488
 3. The signature of the affiant is essential to an affidavit. Whether his name *written by himself* in the body of the affidavit is sufficient, *quære*. *Ibid.*

4. A paper in the form of the statutory affidavit, purporting to be made by the appellant, was returned by the justice with his certificate that it was subscribed and sworn before him. It was not subscribed, and there is nothing in the record to show that the appellant's name in the body of it was in his own handwriting; but he appears to have signed the notice of appeal and the undertaking, on the same sheet with the affidavit. *Held*, that the affidavit was insufficient. *Ibid.*

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(B.) *Voluntary Assignment for benefit of Creditors.*

1. Under the statutes of this state relating to voluntary assignments for the benefit of creditors, sureties upon the assignee's bond are not responsible or sufficient unless they are freeholders in this state. *Klauber, Assignee, v. Charlton*, 564
2. If the proof made by the sureties, purporting to be made under oath, at the time of the taking of the bond, shows that they were sufficient, within the meaning of the statute, and the proper officer approved of them, the assignment cannot be avoided by contradicting the affidavits of the sureties, nor by proof that the oath was not in fact administered, unless it be shown that the assignment was made for the purpose of hindering, delaying or defrauding creditors. *Ibid.*

ATTACHMENT, of the Person. See CLERK of COURT, 2.

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BANKS AND BANKING. See BILLS AND NOTES, 6-8. LIBEL, 1 (2).

BASTARDY ACT.

1. In a proceeding under the Bastardy Act, the paternity of the child is the material fact to be found by the jury; and this fact it must find as upon evidence placing it *beyond reasonable doubt*. *Baker v. The State*, 111
2. Upon the evidence in this case, this court holds it impossible to determine, beyond a reasonable doubt, whether B., the plaintiff in error, or one X., was the father of the child, it appearing from the evidence of the prosecutrix that she had intercourse with X. about two weeks after her intercourse with B., and that the child was born within thirty-seven weeks after the earlier intercourse; and the judgment upon a verdict against B. is reversed on that ground. *Ibid.*

BILL OF EXCEPTIONS. See CRIMINAL LAW, etc., 8. JUDGMENT (F.), 15.

BILLS AND NOTES.

See PARTNERSHIP, 9, 10.

1. One who has signed a note as surety, will not be discharged by an *invalid* agreement to extend the time of payment to his principal; nor by a valid agreement made by a holder without notice that he is a surety. *St. Maries v. Polleys et al.*, 67
2. An usurious agreement for extension of time of payment may be shown by parol, in a proper case. *Ibid.*
3. Where one issue was, whether time of payment had been extended on the note in suit, the jury were instructed that an agreement to pay a bonus or interest in excess of ten per cent., being illegal, would not constitute a sufficient consideration. *Held*, that this must be understood of a mere *executory* agreement, and was correct. *Meiswinkle v. Jung*, 30 Wis., 361. *Ibid.*
4. Possession of a negotiable note is *prima facie* evidence of ownership; and the transfer of a note secured by mortgage carries with it the security, without formal assignment. *Woodruff et al. v. King*, 261
5. In an action upon two promissory notes, by a second indorsee, after the notes, duly indorsed, had been put in evidence, the evidence for defendant was, that after one of the notes fell due, and before maturity of the other, the payees attended a meeting of the maker's creditors to consider the question of a compromise, and stated the amount of their claim, including the notes in question; that several days afterwards a compromise in writing was signed by said payees and other creditors, by which they agreed to take forty per cent. in discharge of their claims, in case all the creditors should sign the agreement; but said payees did not at that time state the amount of their claims. One of the payees then testified for plaintiff, that they sold and delivered the notes to the first indorsee one or two days before the date of the written compromise, for about 70 per cent. of their face. There was no evidence that such payees had agreed with the other creditors, or with defendant, to sign the compromise, before they actually signed it. *Held*,
 - (1) That independently of the evidence, the *presumption* was that the notes were negotiated before due.
 - (2) That the compromise signed by the payees *after* negotiating the notes did not affect the rights of the purchaser or his indorsee.
 - (3) That subsequent *declarations* of the payees that they held the notes at the time of signing the compromise, would not be admissible in evidence against plaintiff.
 - (4) That the failure of the payees to disclose the fact that they had negotiated said notes, at the time of signing the compromise, did not throw upon plaintiff the burden of showing that he purchased in good faith and for value; such notes being valid against defendant for their full amount even in the hands of the payees, at the date of their negotiation.
 - (5) That an oral agreement by the payees, before the negotiation of the notes, to sign the compromise of their entire claim, including such notes (if made, and if binding in law), would not have defeated plaintiff's right to recover the whole amount of the note negotiated *before* maturity, without knowledge on his part of such agreement; nor would

it have thrown upon him the burden of proving the absence of such knowledge.]

(6) That upon the evidence plaintiff was entitled to recover the full amount of both notes. *Gutswillig v. Stumes*, 428

6. The word "currency," in a certificate of deposit, means *money*, including bank notes which, though not an absolute legal tender, are issued for circulation by authority of law, and are in actual and general circulation (at the *locus in quo*) at par with coin. *Klauber et al. v. Biggerstaff*, 551
7. A certificate of deposit promising payment to order of a certain number of dollars "in currency" is negotiable. [*Ford v. Mitchell*, 15 Wis., 305; *Platt v. Bank*, 17 id., 223; and *Lindsey v. McClelland*, 18 id., 481, explained and criticised.] *Ibid.*
8. Ch. 5, Laws of 1863, is also construed as declaring negotiable all notes or certificates of deposit payable in currency. *Ibid.*

BOOM. See NAVIGABLE RIVER.

BOND. See SURETYSHIP.

1. *Bond on Appeal*. See APPEAL (B.), 6-9.
2. *Bond of County Treasurer*. See COUNTIES, 5, 6, 8, 9.

BRIEF ON APPEAL. See APPEAL (A.), 2.

BURDEN OF PROOF. See BILLS AND NOTES, 5 (4), (5).

BY-LAW. See CORPORATIONS (A.), 5, 6.

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Van Valkenburgh v. Milwaukee, - - -	43: 574,	- - -	235, 499
Vedder v. Hildreth, - - -	2: 427,	- - -	409
Wadsworth v. Willard, - - -	22: 233,	- - -	277
Walworth Co. Bk. v. F. L. & T. Co., - - -	16: 629,	- - -	213
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Webster v. Moe, - - -	35: 75,	- - -	413, 416
Webster v. Phoenix Ins. Co., - - -	36: 67,	- - -	243
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Wheeler v. Pereles, - - -	43: 332,	- - -	43
Wilcox v. Bates, - - -	26: 465,	- - -	167
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Williams v. Starr, - - -	5: 534,	- - -	601, 631
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Wilson v. Noonan, - - -	23: 105,	- - -	492
Winchester v. Tozer, - - -	24: 312,	- - -	222, 225
Wis. Riv. I. Co. v. Lyons, - - -	30: 61,	- - -	135
Wis. Riv. I. Co. v. Manson, - - -	43: 255,	- - -	324
Wolcott v. Wolcott, - - -	32: 63,	- - -	679
Wolff v. Stoddard, - - -	25: 503,	- - -	222, 225
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Wright v. Fallon, - - -	47: 488,	- - -	573
Wyman v. The State, - - -	13: 663,	- - -	352
Yates v. Shepardson, - - -	39: 173,	- - -	176
Young v. Tibbits, - - -	32: 79,	- - -	385
Zimmerman v. Fairbank, - - -	35: 368,	- - -	263
Zweifel v. The State, - - -	27: 396,	- - -	112

CASES OVERRULED, CRITICISED, DISTINGUISHED, ETC.

1. *Baker v. Supervisors*, 39 Wis., 447, and *Barden v. Supervisors*, 33 id., 445 (as to effect of including price of revenue stamp in amount to make which land is sold at a tax sale), distinguished. *Milledge v. Coleman*, 184
2. *Barden v. Supervisors*, 33 Wis., 445. See No. 1.
3. *Blakeslee v. Rossman*, 43 Wis., 123, and *Butts v. Peacock*, 23 id., 260 (as to effect upon validity of chattel mortgage of giving it for a sum greater than that owing to mortgagee at its date), distinguished. *Barkow v. Sanger et al.*, 500
4. *Blumer v. Phoenix Ins. Co.*, 45 Wis., 622 (as to the legal effect of statements in application for insurance in respect to the precautions taken against fire), distinguished. *Redman et al. v. Hartford Fire Ins. Co.*, 97
5. *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 385 (as to remedy for breach of conditions in son's mortgage back of land deeded to him by parent), distinguished. *Peterson v. Oleson, imp.*, 122
6. *Bresnahan v. Bresnahan*, 46 Wis., 385. See No. 5.
7. *Butts v. Peacock*, 23 Wis., 260. See No. 3.
8. *Dore v. Milwaukee*, 42 Wis., 108 (as to recovery against city for injuries to real property from change in grade of street), distinguished. *Owens v. City of Milwaukee*, 461
9. *Ford v. Mitchell*, 15 Wis., 304. A remark therein (as to the presumption that a note is taken in payment), doubted, but distinguished. *Hoytlinger v. Wells*, 628
10. *Ford v. Mitchell*, 15 Wis., 304; *Platt v. Bank*, 17 id., 223, and *Lindsey v. McClelland*, 18 id., 481 (as to the negotiability of instruments payable "in currency"), explained and criticised. *Klauber et al. v. Biggerstaff, Garnishee*, 551
11. *Lindsey v. McClelland*, 18 Wis., 481. See No. 10.
12. *Lyon v. Railway Co.*, 42 Wis., 543 (as to right of wife to crops raised on her own land), distinguished. *Dayton v. Walsh*, 113
13. *Marsh v. Fraser*, 37 Wis., 149, and *Yates v. Shepardson*, 39 id., 173 (as to right of partner to recover interest on an accounting), distinguished. *Dimond v. Henderson, imp.*, 172
14. *Platt v. Sauk County Bank*, 17 Wis., 223. See No. 10.
15. *Sabin v. Austin*, 19 Wis., 421, distinguished, and *Smith v. Buck*, 22 id., 577, explained, as to validity of proceedings on execution not showing on its face the authority to issue it. *Kentzler v. C., M. & St. P. R'y Co., Garnishee*, 641
16. *Smith v. Buck*, 22 Wis., 577. See No. 15.
17. *Stahl v. Gotzenberger*, 45 Wis., 121, and *Wadsworth v. Willard*, 32 id., 233 (as to entry of judgment by clerk without formal order), distinguished. *Seymour v. Laycock et al.*, 272

18. *State ex rel. Graham v. Chamber of Commerce*, 20 Wis., 63, as to power of defendant's board of directors, distinguished. *State ex rel. Cuppel v. Milwaukee Chamber of Commerce*, 670
19. *Van Valkenburgh v. Milwaukee*, 43 Wis., 574 (as to recovery for injuries to land in condemnation proceedings subsequently abandoned), distinguished. *Feiten v. City of Milwaukee*, 494
20. *Wadsworth v. Willard*, 32 Wis., 238. See No. 17.
21. *Winchester v. Tozer*, 24 Wis., 312, and *Wolff v. Stoddard*, 25 id., 503 (as to respective rights of town and county in respect to taxes collected by town treasurer), distinguished. *Town of Marinette v. Sup'rs of Oconto Co.*, 216
22. *Wolff v. Stoddard*, 25 Wis., 503. See No. 21.
23. *Yates v. Shrapardson*, 39 Wis., 173. See No. 13.

CERTIFICATE OF DEPOSIT. See BILLS AND NOTES, 6-8.

CERTIFICATE OF ENTRY. See EVIDENCE, 1.

CHAMBER OF COMMERCE. See CORPORATIONS (A.).

CHANGE OF VENUE.

See CORPORATIONS (A.), 1. CRIMINAL LAW, etc., 11,

1. The determination of a motion for a change in the place of trial, to promote "the convenience of witnesses and the ends of justice," rests largely in the discretion of the circuit court; and in this case no sufficient reason appears for reversing an order denying such a motion. *Lynes et al. v. Eldred*, 426
2. An affidavit merely in the words of the statute (R. S., sec. 2625), that the party making it "has reason to believe, and does believe, that he cannot have a fair trial of the action on account of the prejudice of the judge" (naming him), entitles such party to a change of the place of trial. *Bachmann v. City of Milwaukee*, 435
3. Whether perjury can be assigned upon such an affidavit, *quære*; but at least an assignment of perjury cannot be laid upon traverse of the fact of prejudice.] *Ibid.*

CHARTER. See CITIES. NAVIGABLE RIVER, 2.

CHATTEL MORTGAGE.

See PARTNERSHIP, 5-7. VERDICT, 7.

1. Where the mortgagee of chattels takes possession after condition broken, the mortgagor, who has subsequently tendered the sum due on the mortgage, but has not kept the tender good by paying the money into court, cannot maintain replevin for the property. [But whether payment of the money into court would enable him to maintain the action, is not determined.] *Smith v. Phillips*, 202

2. The mortgagee from whom chattels have been wrongfully replevied, is entitled to judgment for their return, with any damages suffered from the taking, or for the amount of the mortgage debt; but cannot have judgment for the full value of the property, if that exceeds the mortgage debt and costs. *Ibid.*
3. Whether or not the mortgagor of chattels, in trespass against him by the mortgagee for a wrongful taking and conversion of the property, could show in mitigation of damages that the mortgage was given and taken with intent to defraud creditors (a question not in this case), that defense may be made by judgment creditors or persons representing them. *Jewett v. Fink et al.*, 446
4. Even where it appears that the chattels mortgaged were exempt from sale on execution, judgment creditors (or their representatives) may show, as against the mortgagee, in mitigation of damages, that the mortgage was not given to secure any debt, and that nothing is due or to become due thereon. *Ibid.*
5. The mere fact that a chattel mortgage was given for a sum greater than was due the mortgagee at the date thereof, is not sufficient to render it void in law. *Butts v. Peacock*, 23 Wis., 260, and *Blakeslee v. Rossman*, 43 id., 123, distinguished. *Barkow v. Sanger et al.*, 500
6. A sale of mortgaged chattels by the mortgagor, without knowledge or consent of the mortgagee, will not invalidate the mortgage. *Ibid.*

CITIES.

See CRIMINAL LAW, etc., 9. EMINENT DOMAIN.

1. A city charter provides that every resolution introduced into the common council for grading and graveling a street at the expense of adjoining lots, shall be referred to a committee, and shall not be adopted within fourteen days after its introduction, nor within ten days after the proceedings relative thereto at the time of its introduction have been published in the official paper; and that when the council determine to make such an improvement, they shall cause to be made and filed with the city clerk certain estimates, before the work is ordered. *Held*, that compliance with each of these requirements is a condition precedent to the liability of adjoining lots for such work. *Hall v. City of Chippewa Falls*, 267
2. Where work of the kind above described was ordered and contracted to be done at the expense of adjoining lots, without taking the necessary steps to charge the lots: *Held*, that the contractor cannot recover from the city, under a charter which declares that "in no event, when work is ordered to be done at the expense of any lot, shall the city be held responsible on account thereof." *Ibid.*
3. Complaint, that by certain acts of the legislature the defendant city was authorized to construct a pier into Green Bay and a road thereto from the city limits, and to keep the road in good repair, and the mayor and common council of said city were empowered to fix, regulate and collect tolls upon said pier; that, the city having constructed such pier and road, the common council leased the pier to plaintiff for one year for a specified sum; that by said lease plaintiff acquired the valuable privilege of charging commissions for all merchandise and freight landed at or shipped from said pier, which amounted to a specified sum for the year

- previous to the action; and that, by reason of defendant's neglect to maintain said road in good repair, plaintiff had suffered damage by loss of tolls or commissions for the use of said pier, in a sum named. *Held*, on demurrer,
- (1) That as there is no averment that the mayor and common council, or the plaintiff under his lease, had ever fixed and regulated the tolls upon the pier, no damage is shown.
- (2) That the power of the common council to regulate the tolls could not be delegated, and the lease was void. *Lord v. City of Oconto*, 386
4. Owners of lots in Milwaukee, injured by a change regularly made since ch. 129, Laws of 1873, in the established grade of an adjoining street, cannot bring an original action in the circuit court for such injuries; but must proceed by appeal, within the time limited by that act, from the assessment of benefits and damages made by the board of public works. *Owens v. City of Milwaukee*, 461
5. One cannot recover of a municipality damages for illegal acts of its officers, if, with knowledge of their illegality, he has assisted in their performance. *Ibid.*
6. The common council of Milwaukee, claiming to act under said ch. 129, changed the established grade of a street, and ordered it to be filled to the new grade; but the order was void for irregularity of the proceedings upon which it was made. Plaintiff, in accordance with such order, filled said street to the new grade in front of his own lot fronting thereon. In an action for the value of such filling, and for injury to the lot from the change of grade: *Held*,
- (1) That if plaintiff did the work knowing that the order was void, he cannot recover therefor.
- (2) That if he did it believing that the proceedings were legal, then, from his failure to appeal from the assessment of benefits and damages made by the board of public works, it must be presumed that he was satisfied with such assessment, by which it was decided that the benefits to the property were a full compensation for the work.
- (3) That if he did it without taking any measures to ascertain whether the proceedings were regular, he must still be held to have thereby agreed to take, for his expenditures and damages, the compensation awarded by the officers, viz., the benefits to the property. *Ibid.*
7. The case of *Dore v. Milwaukee*, 42 Wis., 108, distinguished. *Ibid.*
8. Under ch. 322 of 1875, the board of public works of Milwaukee was authorized to cause the street on which plaintiff's lot fronts, to be paved with wooden block pavement, without petition of the lot-owners therefor, or resolution of the common council authorizing it; one-third of the cost being required to be assessed against the lots fronting on such street, and two-thirds paid out of the ward fund. The complaint alleges, as to the repaving of said street upon the new grade, that some of the lots were assessed more than others, and the assessments were made arbitrarily; but does not allege that more than one-third of the cost was charged to the lots, or more than two-thirds to the ward fund; nor that plaintiff's lot was assessed for more than its just proportion of the whole cost of the work. *Held*, that it does not show any injury to plaintiff. *Ibid.*
9. In assessing benefits to adjoining lots from a contemplated public improvement, the board of public works of Milwaukee added fifty per cent. to the estimated cost of the work to be done in front of each lot, and adopted the amount so determined as the measure of such benefits, irre-

spective of the actual benefit to the lot. It appears that the several lots were very differently affected by the improvement. *Held*, that there was a total failure to exercise the judgment of the board in determining the actual benefits; and the assessment was void. *Johnson v. Milwaukee*, 40 Wis., 315. *Watkins v. Zwietsch et al.*, 513

CLERK OF COURT.

See CRIMINAL LAW, etc., 9, 10.

1. Money was paid into court by a defendant to keep good an alleged tender, and judgment was ordered for plaintiff on the ground that no sufficient tender had been made; but such judgment was never entered, because the controversy was settled by the parties. On motion of said defendant (with due notice to all parties), and on proof that he was entitled to such moneys as against the plaintiff, the court made an order requiring its former clerk, by whom such money had been received, and not paid over to his successor, to pay the same to the moving party. *Held*, no error. *Schnur v. Hickcox*, 45 Wis., 200. *Schnur v. Schnur et al.*, 632
2. Whether the court can enforce its order by attaching its former clerk, not considered. *Ibid.*

COMMISSIONER OF INSURANCE. See INSURANCE COMPANIES.

COMPLAINT. See FORECLOSURE OF TAX CERTIFICATE. PARTNERSHIP, 11. PLEADING, 1, 3, 4. PRACTICE, 1.

COMPOSITION DEED. See CONTRACTS, 6.

CONDEMNATION OF LAND. See EMINENT DOMAIN.

CONFESSION OF JUDGMENT. See JUDGMENT (A.).

CONSIDERATION. See COUNTIES, 10.

CONSPIRACY. See CRIMINAL LAW, etc., 9, 11-13.

CONSTITUTIONAL LAW.

See COUNTIES, 11. FORECLOSURE OF TAX CERTIFICATE. LIEN, 4. NAVIGABLE RIVER, 2, 3. RAILROADS, 1. STATE ROADS, 3-6. TAXATION, etc., 7.

Ch. 51, P. & L. Laws of 1886, in terms empowers J. W., executor of the last will of F. B. W., deceased, to sell all real estate in Wisconsin of which F. B. W. died seized; and it contains no recitals showing that the parties interested consented to the grant of such power of sale, or were under any disability, or showing any reason for such grant; nor was any reason therefor shown at the trial hereof, in which plaintiff claimed under a deed of such alleged executor. *Held*, that, under the evidence, the act appears to be *invalid*, as an attempt to transfer by special act the property of a person not under disability, without his consent, to another person. *Culbertson v. Coleman*, 193

CONTEMPT. See SUPPLEMENTARY PROCEEDINGS, 1, 3.

CONTINUANCE. See PRACTICE, 4.

CONTRACTS.

See BILLS AND NOTES. CITIES, 2, 3 (2). COUNTIES, 3, 5, 6, 9, 10. DEED, 1. EQUITY, 1-3. INSURANCE AGAINST FIRE. MARRIED WOMAN. MORTGAGE. PARTNERSHIP. SHIPPING. STATE ROADS, 2. SURETYSHIP. VENDOR AND PURCHASER.

1. Where A. gave his notes for a large part of the price of chattels purchased by him, and a mortgage of the same chattels to secure the notes, and, upon A.'s default in payment, B., to prevent a seizure of the chattels by the vendors, agreed with them and A. to give the vendors, and did give them, as the nominal purchaser of the chattels, his own notes and a real estate mortgage for the amount remaining unpaid upon A.'s notes: *Held*, in a suit against B. upon his notes, that the original contract of purchase by A. was superseded by this arrangement, and the question whether there was a warranty in the sale to A., and damage to A. from breach thereof, was immaterial. *Abbott et al. v. Johnson, imp.*, 239
2. *It seems*, also, that the use of the property by A. for nearly a year without claim of damages for breach of the alleged warranty, and his assent to the computation of the balance due upon his notes, and the security given therefor, would estop any claim of such damages herein. *Ibid.*
3. Action commenced in justice's court by N., under the statute, to remove B. from certain premises as N.'s tenant in arrears for rent. The alleged lease was set out in the complaint. Answer, a general denial, and that the alleged lease was obtained by fraud and duress, and that the true agreement between the parties was, that B. was to have the use of the land for three years without rent, and the right to purchase it at the end of that time for \$5,600; and that he had paid N. \$1,000 on the contract. B.'s objection to the introduction of the lease in evidence by N. was overruled; and, after N. had further proved nonpayment of rent, and service of the statutory notice, a nonsuit was refused. B.'s evidence showed the following facts: In 1875, N. obtained a judgment of foreclosure of a mortgage on said lands, then belonging to B., for about \$4,400, principal and interest, and, while an appeal from such judgment was pending here, proceedings not having been stayed, the lands were sold on the judgment, and purchased by N. for the amount thereof, and he was partially placed in possession by writ of assistance. The parties then entered into an arrangement by which the amount of the judgment and interest at ten per cent. thereon, and of two other judgments and interest thereon amounting to about \$1,000, was computed, and the total sum of \$6,600 found due, and \$1,000 was paid thereon by B., and his appeal here was dismissed by stipulation, and he was let back into possession of the premises under the instrument set out in the complaint. The main body of said instrument is in the form of a lease of the premises from N. to B. for three years from April 1, 1876, at the yearly rent of \$565 (five dollars being for insurance), the lessee to pay all taxes and assessments during the term; and there is added a stipulation that B., his heirs and assigns, "has the privilege to purchase said premises on the first day of April, 1879, if he shall so desire, by paying for the same the sum of \$5,600." *Held*,
 (1) That, notwithstanding the sale of the premises to him on the foreclosure judgment, N., in the transaction stated, recognized the contin-

ued existence of the mortgage debt, by receiving from B. payment of \$1,000 upon a total sum which included said judgment with interest to that time, and providing in fact for the continued payment of ten per cent. interest on the remainder of said total sum, under the name of rent.

(2) That by the clear intention of the parties and the legal effect of said instrument, under the circumstances, B. reëntered not as a mere lessee, but with other rights, either as prospective purchaser or as mortgagor.

(3) That the statutory proceeding, therefore, would not lie. *Nightingale v. Barena*, 389

4. This court must determine the appeal upon its own view of the legal effect of the instrument and transaction in evidence, and no failure of defendant's counsel to assert that view in the court below would be a waiver of defendant's rights on the appeal, where the legal effect of the instrument goes to the foundation of the action and the jurisdiction of the court.

Ibid.

[TAYLOR, J., dissents from the judgment, holding, 1. That, upon the face of the written instrument, defendant's right of possession under it was only that of a tenant, and the court did not err in overruling defendant's objection to the evidence, nor in refusing a nonsuit. 2. That upon the pleadings and plaintiff's evidence, the justice's court had jurisdiction of the action. 3. That even if defendant's parol evidence showed a transaction giving him other rights of possession under the instrument than those of a lessee (a question not considered), yet, as that evidence was not introduced for that purpose, but the cause was tried only upon the issue of fraud and duress, the claim of such rights under the instrument was waived.]

Ibid.

5. Plaintiff, being perhaps employed by defendant as its state agent for Wisconsin for a term of one year from April 1, 1877, was notified by defendant's vice-president under date December 14, 1877, that, for reasons stated (not implying any dissatisfaction with plaintiff), the directors had concluded that at least for the next calendar year the agency for Wisconsin must be added to the duties of the person who was then defendant's state agent in an adjoining state; and added that defendant's general agent was then in the west, and would probably visit plaintiff in a few days, when "all matters relating to the future" could "be arranged between" him and plaintiff. Plaintiff immediately answered at length, expressing acquiescence in the necessity of the change, and giving no intimation that he should claim his salary after January 1, 1878. On the 19th of December, 1877, he sent out circulars to defendant's subordinate agents in this state, stating that on the first of January then next, the relations existing between him and them would be dissolved "by expiration of engagement;" and commending to them the state agent who was then to succeed him. Held, that these papers show a termination of plaintiff's employment with his consent; and he cannot now recover salary for the remainder of the year covered by his contract. *Southmayd v. Watertown F. I. Co.*, 517
6. If a creditor, after an oral agreement with the debtor and with other creditors to join with the latter in executing a composition deed at a specified rate, and after such deed has been executed, in pursuance of the agreement, by such other creditors, refuses to sign it, he can recover only the rate fixed in the agreement. *Mellen et al. v. Goldsmith*, 573
7. A lease of an unimproved city lot provided that in case the lessee should make improvements on the premises during the term, it should be

optional with the lessor either to have such improvements appraised by arbitrators at the end of the term, "without regard to the situation or value of the premises leased," and pay the lessee such value, or to have the leased premises appraised in like manner, "without regard to the improvements," and renew the lease, etc. The lessee, during his term, built a dwelling house on the lot, and made other valuable improvements suitable for a residence. *Held*,

(1) That, upon the lessor's refusal to renew, the value of *all* such improvements should be allowed to the lessee, and not merely of those which, as between landlord and tenant, might be removed by the latter.

(2) That the *present actual value* of the improvements, treating the property as a residence, is the value to be allowed. *Hopkins, Adm'x, v. Gilman*, 581

8. Defendants having a "mercantile agency" with a "collection department," in this state, plaintiffs left with them a claim, for collection, and took from them a receipt stating the amount of such claim and that it was to be transmitted by mail for collection or adjustment, to an attorney, at the risk and on account of the plaintiffs, and the proceeds to be paid over or accounted for to them when received by defendants from said attorney. Plaintiffs also signed a receipt in defendant's books, which stated the nature and amount of their said claim, and that the receipt first above mentioned had been given them, reciting its terms. *Held*,

(1) That, in the absence of any proof of fraud in respect to them, these receipts fix the rights and liabilities of the parties in regard to said claim, even if accepted or subscribed by plaintiffs without reading them.

(2) That, under such receipts, defendants were not liable for the acts or default of the attorney employed by them to collect the claim, unless they were guilty of gross negligence in the selection of such attorney.

LYON and TAYLOR, JJ., dissent as to the second point.

(3) What the liability of defendants would have been in the absence of any express contract, not considered. *Sanger et al. v. Dun et al.*, 615

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 1-4. RAILROADS, 2, 4-6.

CONVERSION. See CHATTEL MORTGAGE. DAMAGES, 1-8.

CORPORATIONS.

(A.) *Private Corporations*. See RAILROADS, 1.

1. In an action against a corporation and its directors, a defendant director, who was also secretary of the corporation, made an affidavit of the prejudice of the judge, and asked for a change of the place of trial; stating in the affidavit that he made it, and asked the change, for himself and in behalf and at the request of all the other defendants; and they all, by their attorney, moved for the change. *Held*, sufficient. *State ex rel. Cuppel v. Milwaukee Chamber of Commerce*, 670

2. The jurisdiction and duty of the courts of this state in exercising the visitatorial or superintending power of the state over its own corporations, to confine them within their franchises and correct and punish abuses thereof, asserted, and the modes of exercising such jurisdiction stated. *Ibid*.

3. The imposition of a fine upon a member of the defendant corporation, in his absence, without notice, formal complaint or trial, *held* a void proceeding. *Ibid*.

4. Where, after the member had been suspended for refusal to pay such fine, the proceeding was annulled by the directors, and the member restored, such void proceeding against him is no bar to a subsequent regular proceeding for the same offense. *Ibid.*
 5. A rule of the defendant chamber of commerce prohibiting its members from "gathering in any public place in the vicinity of the Exchange Room," and "forming a market" for the purpose of making any trade or contract for the future delivery of grain or provisions, *before the time fixed for opening the Exchange Room* for general trading, or *after the time fixed for closing the same, daily, held, to be within the power conferred on the corporation by its charter* (ch. 153, P. & L. Laws of 1867, amended by ch. 39 of 1877), and not to be unreasonable or an unlawful restraint upon trade, nor void for uncertainty. *Ibid.*
 6. Under the present charter of said defendant, it may, by rule or by-law, confer upon the board of directors the power, and impose upon it the duty, of suspending a member convicted of a violation of the foregoing rule, who refuses to pay the fine imposed upon him therefor by the president in pursuance of another clause of the same rule. *State ex rel. Graham v. Chamber of Commerce*, 20 Wis., 63, approved but distinguished. *Ibid.*
 7. The relator having been fairly tried, upon due notice, and in accordance with the rules of the corporation, and there being abundant proof against him tending to show that he had committed the offense charged, he will not be restored by *mandamus*. But whether the court, in such a case, will look into the testimony for any purpose, *quere*. *Ibid.*
- (B.) *Public Corporations*. See CITIES. COUNTIES. CRIMINAL LAW, etc., 9. DRAINAGE FUND. EMINENT DOMAIN. NAVIGABLE RIVER, 2, 3. STATE ROADS.

COSTS.

See APPEAL (A.), 2. DAMAGES, 4.

1. Under ch. 60, Laws of 1862 (Tay. Stats., 1531, § 55), with certain exceptions not affecting this case, no costs can be recovered by the plaintiff in actions on contract brought in the circuit court, which might have been brought in justice's court. *Kirst et al. v. Wells*, 56
2. The objection that no costs could lawfully be taxed in a cause, is available on appeal from the taxation, though not taken before the taxing officer. *Ibid.*
3. On affirming a judgment herein as to damages, and reversing it as to costs, this court directs, with respect to costs here, that judgment go against the respondents for the clerk's fees only, and that otherwise each party pay his own costs. R. S., sec. 2949. *Ibid.*
4. In the absence of evidence to the contrary, it must be presumed that motions for which costs were taxed were "ordinary motions," and an allowance therefor, in the taxation of costs, of a greater sum than that prescribed by statute (sec. 41, ch. 133, R. S. 1858), is error. *Abbott et al. v. Johnson, imp.*, 239
5. No separate costs are allowed by the statute for copying *indorsements* of papers. *Ibid.*

6. It must be presumed, in the absence of proof to the contrary, that an allowance by the circuit court for sheriff's fees for serving subpoenas was supported by the returns to subpoenas before the court. *Ibid.*
7. An allowance for several days' attendance of witnesses who were *attorneys-at-law*, held not erroneous, where it does not appear that they were "counsel in the cause." *Ibid.*
8. On affirming the judgment herein in other respects, but directing a deduction of about twelve dollars from the costs allowed, this court denies costs of this court to either party, but requires the appellant to pay the clerk's costs. *Ibid.*
9. In an action on contract, for breach of warranty, brought in the circuit court, where plaintiff claims over \$200 damages and recovers less than \$50, he may recover *taxable costs* at the discretion of the court. Subd. 7, sec. 2918, R. S. *White v. Hale*, 424
10. Under secs. 69, 73, ch. 133, Tay. Stats., and prior to the revision of 1978, where an action for an assault and battery had been commenced in justice's court, and, on appeal from a judgment for the defendant, plaintiff had recovered in the circuit court any sum, though less than \$50, as damages, he was entitled to *full costs*; and subd. 4, § 54 of the same chapter, had no application to the case. *Schaeffel v. Hinz*, 647

COUNTIES.

See PLEADING, 2. TAXATION, etc., 1-3.

1. Under sec. 1, ch. 34, R. S. 1858, every town was primarily under a legal obligation to relieve and support all indigent persons having a lawful settlement therein; and where, in any county, proper action was taken by the county supervisors as authorized by that statute (sec. 32), to "abolish the distinction between county poor and town poor in such county, and have the expense of maintaining all the poor therein a county charge," this legal obligation was transferred to the county. *Mappes v. Board of Supervisors*, 31
2. The fact that a county, in such a case, had procured (under the same chapter) an order from the county judge upon one or more relatives of a pauper, requiring him or them to contribute a certain amount weekly for the maintenance of such pauper, would not, as to other persons, relieve the county from its primary liability for such maintenance. *Ibid.*
3. Where, therefore, after such an order had been procured, a pauper was removed from the county poor-house, by order of one of the superintendents of the county poor, and, being also refused a home and support by her relatives, was boarded and cared for by the plaintiff at his public house for some time before he discovered that she was a pauper: *Held*, that the county was liable to him for her maintenance. *Ibid.*
4. Members of a legislative body or municipal board are disqualified to vote therein on propositions in which they have a direct pecuniary interest adverse to the state or municipality which they represent; and this rule applies to a board of county supervisors. *Board of Supervisors v. Hall, imp.*, 208
5. The discharge or release of a county treasurer from his legal liability for funds in his hands would discharge also his sureties. *Ibid.*

6. The county treasurer and the sureties on his *drainage-fund* bond are liable *to the county* for any conversion of the drainage fund by such treasurer, although the county holds that fund in trust for the towns entitled to it; and such sureties, being members of the county board, are therefore disqualified to vote upon any proposition to release the treasurer from his legal liability for a conversion of such funds. *Ibid.*
7. To pass a resolution at a meeting of a county board, a number of persons *qualified to vote* upon such resolution, sufficient to constitute a majority of the whole board, must not only be present at the meeting, but must *actually vote* upon the resolution; and where the contrary fact appears, the resolution is treated as a nullity. *Ibid.*
8. Where a county treasurer had converted drainage and other funds of his county, seven of the ten members of the county board were present, and voted upon a resolution to compromise with the treasurer by taking new securities for a smaller sum than that converted, and discharging the treasurer. Two of the seven were sureties on the treasurer's drainage-fund bond; and one of these voted for and the other against the resolution, which received five affirmative votes. *Held*, that the resolution was not passed. *Ibid.*
- [9. Whether it is competent for a county board, in any case, to discharge the treasurer and his sureties from liability on his official bond, without a full compliance with its conditions, and (if so) what are the limitations of this power, or the conditions of its exercise, are questions not here considered.] *Ibid.*
10. Notes given by the county treasurer, and a mortgage to secure them given by a third person, in pursuance of the scheme of compromise expressed in the resolution aforesaid, *held* invalid for want of a consideration. *Ibid.*
11. Under sec. 22, art. IV of the state constitution (which empowers the legislature to confer upon boards of county supervisors "powers of a local *legislative* and administrative character"), it *seems* that when any subject of legislation is entrusted to county boards by general words in a statute, they acquire a right to pass any ordinance necessary or convenient for the purpose of disposing of the whole subject so committed to them, and for that purpose have all the powers of the state legislature over that subject, unless the statute restricts the power or directs its exercise in a certain way. *Supervisors of La Pointe v. O'Malley et al.*, 332
12. Under sec. 670, R. S. (which empowers county boards "to set off, organize, vacate, and change the boundaries of the towns in their respective counties, subject to the limitations" afterwards prescribed), a county board has power to abolish an existing town, attach different parts of its territory to other existing towns, and provide that one of the latter shall succeed to the rights of the old town in specified property—in this case a judgment against third parties. *Ibid.*

COUNTY BOARD. See COUNTIES, 4-12. DRAINAGE FUND. PLEADING, 2.

COUNTY ORDERS. See TAXATION, etc., 1-3.

COUNTY TREASURER. See COUNTIES, 5, 6, 8-10.

COUNTY COURT. See APPEAL (B.).

COURT AND JURY.

SEE BASTARDY ACT, 2. PARTNERSHIP, 8. RAILROADS, 2, 3, 6.

1. The question of the credit due testimony is for the jury; and where a witness has distinctly testified to facts which would sustain the verdict, a judgment on the verdict will not be reversed on the ground that such testimony was contradicted by that of several other witnesses. *St. Maries v. Polleys et al.*, 67
2. The question of fraudulent intent as to creditors, in a chattel mortgage, is usually one of *fact*, for the jury; and it was properly submitted to the jury in this case. *Barkow v. Sanger et al.*, 500
- [3. Whether, under the statute (R. S., sec. 2323), it is always necessary, in taking a special verdict in cases of this kind, to submit the question of fraudulent intent to the jury, even where the court may, upon the evidence, be justified in directing them what answer to find, *quære*.] *Ibid*.

COURT COMMISSIONER. See SUPPLEMENTARY PROCEEDINGS, 1-3.

COVENANT. See EQUITY, 1-4.

CRIMINAL LAW AND PRACTICE.

See INDIANS.

1. In a prosecution for rape, it was not error, against the accused, to omit to instruct the jury, in the general charge, that if they did not find him guilty of rape, they might find him guilty of assault with intent to commit that crime. *Connors v. The State*, 523
2. The court below did not caution the jury that prejudice was liable to be aroused against the accused because of the heinous nature of the crime alleged; nor call their attention to the difficulty of defending against such an accusation; nor press upon their attention the rule that voluntary submission by the woman while she has power to resist, however reluctantly yielded, deprives the act of an essential element of rape; nor instruct them that proof of the good reputation of the accused as a peaceable and law-abiding citizen (there being such proof in the case) was entitled to some weight in his favor, especially if there were circumstances proved on the trial upon which a doubt of his guilt might be based. The court also refused instructions asked by the accused, containing some inaccuracies, but which aimed to state the foregoing propositions. *Held*, in view of the evidence at the trial, that such neglect to charge was error. *Ibid*.
3. To give this court jurisdiction of a criminal action certified to it upon exceptions (under sec. 4720, R. S.), such exceptions must have been presented to the judge of the court below and allowed by him during the term of the trial. In other cases, the remedy is by writ of error to bring up the record, after judgment. *State v. Bierbach et al.*, 529
4. The rule in this state is, that, for the purpose of determining whether a paper offered in evidence is in defendant's handwriting, the jury may compare it with other documents *already admitted in evidence upon other*

grounds, and shown to be in his handwriting; but that such a paper cannot be put in evidence for the mere purpose of such a comparison. *State v. Miller*, 530

5. On trial of an indictment, it appeared that public officers, while questioning defendant as to his participation in the crime charged, repeated orally to him the words of a letter supposed to have been written by him, containing threats of such crime; and that defendant, in their presence and at their request, wrote on another paper the same words. Said officers, while testifying at the trial to the admissions of defendant at such examination, produced such copy, and it was received in evidence and submitted to the jury for comparison with the original letter. *Held*, that it formed no part of defendant's admissions, and, not being admissible for any other purpose than that of such comparison, it should not have been received for that purpose, under the foregoing rule. *Ibid.*
6. Arson not being in general a crime of like nature and intent with forgery or larceny, in the trial of an indictment for arson, proof that defendant had been guilty of forgery and larceny is not admissible, unless accompanied by evidence that the latter crimes and the one charged had a common purpose, or that one was committed to conceal the others. *Ibid.*
7. Where the record shows evidence, upon trial of a criminal action, tending to support the verdict against the accused, and appearing to have satisfied the jury beyond reasonable doubt, and the court below refused a new trial, this court refuses to reverse the judgment on the ground of a want of evidence or a preponderance of evidence against the verdict. *Casper v. The State*, 535
8. Where the court below gave all correct instructions asked by the counsel of the accused, and no others, and these are not shown by the bill of exceptions, the presumption is that they were full and correct, and included an instruction that the jury should not convict the accused unless satisfied of his guilt beyond a reasonable doubt; and failure of the judge to give separate instructions of his own is not error. *Ibid.*
9. Under a statute (ch. 370 of 1876) which requires the clerk of a court to pay periodically, at fixed times, into the treasury of a city, unpaid witnesses' fees received by him, and makes the city, after receiving the moneys, merely liable to pay the witnesses upon their demand, the city has at least a *special property* in the money after it becomes payable into its treasury; and this will support an averment of property in the city in an information against the clerk and another person for conspiracy to cheat and defraud the city. *Ibid.*
10. One who, as clerk of a court, has officially received a fine imposed by the court, cannot question the validity of the fine or his official duty in respect of it. *Ibid.*
11. Separate trials may be had upon indictment or information for conspiracy; and under secs. 4630, 4635, R. S., where the venue is changed for some only of the defendants in such an indictment or information, separate trials must be had. *Ibid.*
12. Where several persons are prosecuted together for a crime which one, or other limited number only, cannot commit (like conspiracy or riot), and are taken and may be brought to trial, and, on separate trials, verdicts go against a number who are not capable in law of committing the crime, judgment against those found guilty should be suspended until the number necessary to the crime are convicted; those already found guilty

being meanwhile held in custody or under recognizance. Failing conviction of a sufficient number, those against whom verdicts have been found should be discharged. When verdicts are found against the number necessary to the crime, judgment should go against them. *Ibid.*

13. In such a case, where the accused have been tried in different courts, transcripts of so much of the record as may be necessary to show the verdict in each case should be transmitted from one court to another. *Ibid.*
14. On trial of an information for stealing lambs and sheep, the owner testified that on a certain morning he missed from his yard animals of the number and character described in the information; and that he had driven them into his yard the night before, and during the night they were taken away. *Held*, that upon this evidence (in the absence of any tending to show consent), the jury might find that the property was taken without the owner's consent. *Fowle v. The State*, 545
15. There was further evidence that property like that described in the foregoing testimony was found in defendant's possession a few hours after the taking; that defendant had been in the vicinity of the owner's place about the time of the taking; and that he told persons to whom he offered to sell the property, that he bought it at public auction in a certain place; and persons living in the vicinity of that place testified that there had been no auction there. No evidence was offered by defendant to account for his possession of the property. *Held*, that the evidence was sufficient to sustain a conviction. *Ibid.*
16. The statutes of this state do not authorize the judge of the municipal court of Milwaukee county to *report* a case to this court for the determination of questions of law arising therein, where the defendant has been prosecuted and tried on complaint, as in cases before justices of the peace, without information or indictment. *State v. Allison*, 548

"CURRENCY." See *BILLS AND NOTES*, 8.

DAMAGES.

See *CHATTEL MORTGAGE*, 2-4.

1. It has been an established rule of the English courts for more than a century (adopted to the full extent in the courts of Vermont, and followed in some cases in other states), that in trover the court will, under certain circumstances, permit the defendant to bring the property into court for plaintiff, with costs up to that time, and will then order a stay of proceedings, or permit plaintiff to proceed with the action at the risk of having the costs finally adjudged against him, if he fails to show special damage, beyond the value of the property at the time of its return; or, upon tender of the property after verdict, it will, in a proper case, reduce the verdict to nominal damages. *Churchill v. Welsh*, 39
2. In this case, it appears clearly from the evidence that the notes of a third person running to plaintiff, which he alleges to have been converted by defendant, came to the possession of defendant either as agent for the plaintiff solely, or (as defendant himself claims) as custodian for both plaintiff and the maker; that defendant never claimed to own or have any interest in them; that he offered, before suit, to surrender them if both parties would agree to the surrender; that immediately after suit

brought, he offered to bring them into court, and asked to be relieved from all further responsibility in relation to them; and that he acted in good faith, believing that he had no right to surrender the notes to defendant without the consent of the maker; and it does not appear that plaintiff suffered any special damage from defendant's refusal to deliver them. After verdict against defendant for the full value of the notes, his motion that the verdict be reduced to nominal damages, and the clerk ordered to deliver the notes to plaintiff, having been denied, a judgment entered pursuant to the verdict is reversed on appeal, with directions to enter judgment in plaintiff's favor for nominal damages and costs, upon surrender of the notes to him. *Ibid.*

3. The action, being trover instead of replevin, is probably not within the provision of sec. 22, ch. 122, R. S. 1858 (R. S. 1878, sec. 2610), which provides for substituting a third person as defendant, instead of the actual defendant, in actions "upon contract, or for specific, real or personal property," in certain cases there defined. *Ibid.*
4. If defendant, before this action was brought, might have maintained a suit to compel plaintiff and the maker of the notes to interplead, still his failure to do so should only subject him to payment of the costs of this action, and loss of the costs which he might have recovered in the action of interpleader. *Ibid.*
5. In actions for the tortious taking or conversion of goods, or for breach of contract to deliver goods, unless plaintiff has been deprived of some special use of the property, anticipated by the wrongdoer, or is entitled to exemplary damages, the general measure of damages is the value of the chattels at the time and place of the wrongful taking or conversion, or at which delivery was due, with interest to the time of trial. *Ingram v. Rankin et al.*, 406
6. In case of a wrongful taking or conversion, if defendant has sold the goods, plaintiff may, at his election, recover the amount for which they were sold, with interest from the sale to the trial. *Ibid.*
7. If the chattels wrongfully taken or converted are still in defendant's possession at the time of trial, plaintiff may, at his election, recover their present value at the place of the taking or conversion, and in the form in which they were when taken or converted. *Ibid.*
8. These rules do not apply to cases in which damages are regulated by special statutes. *Ibid.*
9. Where goods sold have not been paid for, the measure of damages for failure to deliver them according to contract is generally the difference between the contract price and the market value of like goods at the time and place stipulated for such delivery. *Hammer v. Schanzfelder*, 455
10. But where the special purpose for which the goods were wanted by the vendee was known to the vendor, he is liable on the contract for any special damage resulting to the vendee (without fault on his part) from the failure to deliver; such special damage being the natural consequence of the nondelivery, presumably contemplated by the parties. *Ibid.*
11. In every such case, the unpaid contract price of the goods must be deducted from the aggregate of the damages which the vendee would have been entitled to recover if he had paid the vendor such contract price. *Ibid.*

DEED.

See EQUITY, 1-5. MORTGAGE. TAXATION, etc., 4-7.

1. Defendants being in possession of real estate under an unexpired lease from plaintiff, the following instruments were exchanged and took effect on the same day in 1859: 1. A warranty deed from plaintiff, for the consideration of \$1,200 therein named, conveying the property absolutely, in fee, to the defendant C. 2. An agreement of C. to reconvey the property to plaintiff (with covenants against his own acts), if the latter should pay C. \$1,200 on the 4th of August, 1861; with covenant that time should be of the essence of the contract, and with a further agreement that C. should have possession and enjoyment of the property until said sum was paid. 3. A quit-claim deed from plaintiff to C.; and 4. An agreement that said quit-claim deed should be placed in the hands of one X., to be held by him until said August 4, 1861, to be delivered by him to plaintiff in case of payment of the \$1,200 by plaintiff to C. on that day, and otherwise to be delivered to C. This agreement contained a recital of the essential terms of the instrument secondly above described, and constituted X. plaintiff's attorney to hold and deliver the quit-claim deed as above stated. 5. A lease of the same property from plaintiff to defendants for a term of years commencing September 10, 1861; to take effect only in case defendants gave plaintiff written notice, at least three days before said last named date, that they elected to take under the lease. On the day of the delivery of these papers, defendants' prior lease was surrendered by them to plaintiff. None of the papers contained any agreement by plaintiff to pay \$1,200 at any time. *Held*, that, upon their face, said papers (with the surrender of the prior lease) do not show the relation of debtor and creditor to have existed between plaintiff and C.; and the transaction was an absolute conveyance and a conditional agreement to reconvey, and was not a mortgage. *Smith v. Crosby et al.*, 160
2. In this action to redeem from the lien of an alleged mortgage, etc., this court regards the *parol* evidence as not sufficient to justify it in holding, contrary to the finding and judgment of the court below, that the real transaction was a loan of money by C. to plaintiff, secured by the instruments above described; and it therefore affirms a judgment for defendants. *Ibid.*
3. An executor having undertaken to sell and grant the lands of his testator on behalf of the persons then interested in them, deeds of the land from such persons to the executor's grantee, confirming the sale, would take effect as of the date of the executor's deed, except as to persons claiming under such parties by deed subsequent to the executor's sale and prior to such deeds of confirmation. *Culbertson v. Coleman*, 193
4. But deeds of confirmation purporting to be executed by heirs and residuary legatees of the testator are insufficient, without proof that the title in fact passed to such grantors. *Ibid.*
5. In a deed of a quarter-section of land bounded only on the north by a town line, an exception of "the 32 acres mortgaged to A. adjoining the town line," must be *presumed*, in the absence of the mortgage, to be an exception of a parcel of land extending the whole length of the north side of the quarter-section, of sufficient uniform width to include 32 acres; and an exception of seven acres "to be taken on the east side of said described land," is an exception of a parcel of land extending along the

whole east side of the quarter-section, of sufficient uniform width to include seven acres; and such exceptions are not void for uncertainty. *Johnson et al. v. Ashland Lumber Co.*, 326

DEMURRER. See PLEADING, 5.

DRAINAGE FUND.

See COUNTIES, 6, 8.

The laws of this state for the distribution of the "drainage fund" to the towns are *valid*; and if they were void as violating the trust upon which the swamp lands were granted by congress to the state, neither a town treasurer who received them as such treasurer for the use of his town, pursuant to those laws, nor any person to whom he unlawfully transferred them, could be heard to defend against liability to the town therefor, on the ground that such laws were invalid (*Bullwinkel v. Guttenberg*, 17 Wis., 583; *Cairns v. O'Bleness*, 40 id., 369); and an order of the county board directing such town treasurer to pay a part of said funds to another town would be void, and no protection to the treasurer or to the town receiving the money pursuant thereto. *Town of La Pointe v. Town of Ashland*, 251

EMINENT DOMAIN.

1. Where proceedings by a corporation to condemn land for a public use have been lawfully abandoned, the owner can recover only damages resulting to him from *wrongful acts* done by the corporation in the course of such proceedings. *Feilen v. City of Milwaukee*, 494
2. Complaint that on the 26th of April, 1875, the defendant city concluded that certain premises of defendant, on which was a dwelling house, were necessary for a public street; that, on application of the city, a jury was appointed May 3d of the same year, to determine the necessity of the taking, and promptly reported it necessary, but the city *unnecessarily* delayed further action until October 4, 1875, when it confirmed the report of the jury, and directed the board of public works to make an assessment of benefits and damages; that on November 8th, 1875, the condemnation proceedings were abandoned by resolution of the common council; and that, by reason of the pendency of those proceedings and the public knowledge thereof, plaintiff had been unable to rent the premises, to her damage, etc. *Held*, on demurrer,
 - (1) That the *facts* averred do not show that the delay of the city to complete the condemnation proceedings was unnecessary; and a general averment to that effect is not sufficient.
 - (2) That mere delay in such proceedings, without any element of malice or want of probable cause for the condemnation, would probably not be a cause of action in any case.
 - (3) *It seems* that if plaintiff had leased the premises, covenanting with the lessee for their quiet enjoyment, any damages recovered of him by the lessee for breach of that covenant, caused by the taking of the land by the city, would have been a valid claim in plaintiff's favor against the city. *Driver v. Railway Co.*, 32 Wis., 569. *Ibid.*
3. The complaint also alleged subsequent condemnation proceedings of the city, including the appointment and affirmative report of a jury, con-

firmation of such report, and an order made for an assessment of benefits and damages; that in the course of these proceedings the board of public works, pursuant to a resolution of the common council, caused public notice to be given that the building would be sold at public auction, and afterwards entered on the land and sold the building; that some two months afterwards the city abandoned the proceedings; and that, in consequence of these proceedings, persons were deterred from renting the premises, and they had become depreciated in value, to plaintiff's damage, etc. *Held*, that the only wrongful act alleged is the entry upon plaintiff's premises and attempted sale of the house; and that, while this may show a cause of action *quare clausum fregit*, it does not show any ground of injury by reduction of the rental value of the premises, which is the *gravamen* of the present action. *Ibid*.

4. *Van Valkenburgh v. Milwaukee*, 43 Wis., 574, distinguished from this case. *Ibid*.

EQUITY.

See NAVIGABLE RIVER, 4. PARTNERSHIP, 1.

1. A son gave a mortgage of land to secure performance of covenants by which he was bound to furnish his mother, the plaintiff, each year, commencing in 1868, a certain quantity of grain, hay and pasture, and for every second year certain other chattels, etc. On his failure to perform his covenants: *Held*, that as the condition of the mortgage is not the support and maintenance of the plaintiff, but the payment of life annuities in specific articles, the proper remedy is not a rescission of the contract (as in *Bogie v. Bogie*, 41 Wis., 209, and *Bresnahan v. Bresnahan*, 46 id., 385), but a foreclosure of the mortgage, and sale of the premises to make the amount of damages accrued for past breaches, together with the present value of the annuity which the mortgagor's covenant binds him to pay plaintiff for the remainder of her life. *Peter-son v. Olson, imp.*, 122
2. In computing the present value of such annuity, there was no error in using the Northampton tables, in the absence of any statute or rule of court on that subject. *Ibid*.
3. By the terms of the mortgagor's covenant, he is also bound to take care of plaintiff during sickness, until her death; and, in a suit to foreclose, the court below included in the judgment a certain sum as the estimated value of such future care. On appeal of a judgment creditor of the mortgagor, made a defendant to the action: *Held*, that as the covenant was for the performance of a prospective filial duty, the value of which cannot be estimated in money, the allowance of this item was error. *Ibid*.
4. Judgment in such a case should permit a redemption at any time before sale, by payment of the sum actually due for past breaches, including stipulated solicitor's fees, with interest and costs (leaving plaintiff at liberty to apply for a further judgment in case of any future default). And it should direct future annual payments to be made in cash, at the cash value of the stipulated payments as determined by the court. *Ibid*.
5. Equity will not entertain an action to reform a deed by inserting a condition subsequent, and to declare a forfeiture for breach of such condition. *Mills et al. v. Evansville Seminary et al.*, 354

6. The judgment of this court on a former appeal herein was remitted in April, 1868, directing the court below to ascertain the value of the improvements made by the plaintiff lessee, and that he be permitted to retain possession until such value was paid to him by the lessor. *Hopkins v. Gilman*, 22 Wis., 476. The plaintiff remained in possession, and the cause was not again brought to a hearing until 1878. *Held*, that in stating an account between the parties, to determine what sum must be paid by the defendant lessor to entitle him to possession, plaintiff must be regarded as a tenant equitably entitled to hold over, and actually holding over, and must be charged with rent (without interest) and all outstanding taxes (as provided in the lease), and is not to be allowed interest on the value of his improvements for any period whatever. *Hopkins, Adm'r, v. Gilman, imp.*, 5:1
7. In 1876, the defendant lessor filed a supplemental answer, alleging, among other things, that the plaintiff lessee, being in possession, had failed to pay the taxes and assessments for 1869 and subsequent years; that an undivided portion of the lot had consequently been sold for delinquent taxes, and a number of tax certificates were outstanding; and that X. and Y. (the lessee's brothers), for the purpose of creating a cloud upon the title, and to hinder defendant in the enforcement of his rights, had procured and recorded two tax deeds, which they held for the benefit of the lessee; and part of the relief asked was, that the lessee procure from X. and Y. deeds of release of their interest under said tax deeds, and that such tax deeds be adjudged fraudulent and void as against said lessor. *Held*, that there was no error in permitting the supplemental answer to be filed, and X. and Y. brought in as parties defendant; especially as they answered the supplemental answer as a cross bill, without objecting to the order. *Ibid.*
8. X. and Y. appearing to have taken their tax deeds for the benefit of the plaintiff lessee, the judgment as to them should declare such deeds cancelled. *Ibid.*

ERROR. See FORECLOSURE OF MORTGAGE, 7. JUDGMENT (E.). JUDGMENT (F.). SUPPLEMENTARY PROCEEDINGS, 7.

ESTATES OF DECEDENTS.

See APPEAL (B.). DEED, 3, 4.

1. Where there are several administrations of an intestate estate, in different jurisdictions, a judgment against one administrator does not bind another. *Price v. Mace, Adm'r*, 23
2. Whether and how far judgments against the *principal* administrator, accompanied by proof that there are no assets in his hands to satisfy them, would be *evidence* in a court which had granted *ancillary* letters, *quære*. *Ibid.*
3. It is the place of the intestate's domicile at the time of his death, and not the place of his death, which determines the principal administration. *Ibid.*
4. Where letters of administration on the same estate were granted in this and another state, and both describe the intestate as *of that place*, a judgment against the foreign administrator is not even *prima facie* evidence, in an action against the Wisconsin administrator. *Ibid.*

5. Where an administrator purchases with money of the estate, and has conveyed to himself, an outstanding tax title upon land of his intestate, it inures to the benefit of the heir. *Watkins v. Zwietsch et al.*, 513

ESTOPPEL. See CITIES, 5-7. CONTRACTS, 2, 6.

EVIDENCE.

See BASTARDY ACT. BILLS AND NOTES, 2, 4, 5 (3)-(5). CRIMINAL LAW, etc., 4-6, 14, 15. ESTATES OF DECEDENTS, 2, 4. PARTNERSHIP, 2, 3, 7-10. SLANDER. SURETYSHIP.

1. A certificate of the register of a U. S. land office in this state, in the form prescribed by sec. 4166, R. S., is evidence that the person therein named became entitled, by the purchase there certified, to a patent from the United States of the land described; and after a lapse (in this case) of twenty years from the entry and purchase, it will be *presumed* that a patent was issued to the purchaser, as the law requires. *Culbertson v. Coleman*, 193
2. A deed of a quarter-section of land excepted 32 acres mortgaged to A. The record of a mortgage from the same grantor to A. of 34 acres of land in *another* quarter of the same section was produced on the trial, and no other mortgage from said grantor to A. was found of record. *Held*, that this was no proof of the nonexistence of an *unrecorded* mortgage corresponding to the description in said deed. *Johnson et al. v. Ashland Lumber Co.*, 326
3. Where the question was, whether certain grain, etc., seized on executions against one H., was his property or that of the plaintiff, and it appeared that it was raised on land previously conveyed by H. to plaintiff, the court instructed the jury that plaintiff was entitled to the possession of the land, and that the only question for them was, whether he raised the grain for his own exclusive use, or for the use of H., and that if he raised it for H.'s use, it was subject to seizure on the executions against H. *Held*, that evidence was inadmissible on defendant's part to show that H., conversing with the witnesses *in the absence of plaintiff*, after the conveyance of the land to the latter, claimed to have an interest in the farm or its products; the questions of conspiracy and fraudulent intent not being involved in the issue as submitted to the jury, and the rule that the declarations of one *conspirator* are admissible against the others, though made in their absence, being therefore inapplicable. *Fay v. Rankin et al.*, 400
4. *Quere* whether H.'s declarations would have been admissible even if the question of fraudulent intent had been at issue. *Ibid.*
5. Where, in slander, a witness had testified to a declaration of defendant charging plaintiff with theft, he was asked whether he understood defendant to make the charge. *Held*, immaterial and improper. *Kidd v. Fleek*, 443
6. A witness who had testified to a declaration of defendant charging plaintiff with theft, and stating the circumstances, was asked if he knew *who* was charged. *Held*, immaterial and perhaps improper. *Ibid.*
7. A witness who had testified that he witnessed the theft, of corn, from defendant's cornfield, and that he visited the *locus in quo* some time after-

- ward, was asked what he saw there, and answered that "corn had been husked there." *Held*, competent. *Ibid.*
8. In the same action plaintiff testified that her family had corn of their own, and stated how much; but the latter statement was stricken out on defendant's motion. *Held*, immaterial. *Ibid.*
 9. In trespass by the keeper of a stable for the taking from his possession, and conversion, of a horse, upon which he claimed a lien for its keeping, the defendants, being creditors of the owner of the horse, offered evidence of an attempted settlement of all accounts between such owner and the plaintiff, in which the latter made no claim against the former for the keeping of the horse. It appears that the parties were attempting at that time to *compromise* and settle their affairs; and the evidence was rejected on that ground. *Held*, no error. *Jewett v. Fink et al.*, 446
 10. In an action upon a written instrument, plaintiff can be put upon proof of the genuineness of defendant's signature to the instrument, under the statute, only by a *specific* denial thereof by affidavit or verified answer; and a denial by *inference* is not sufficient. *Smith v. Ehnert*, 479
 11. Thus, in this action upon a promissory note which purported to be signed by defendant as maker, his answer alleging, on information and belief, first, that if the note was made by him at all, it was made by mistake on his part, through plaintiff's fraud and without consideration; and secondly, that the note was a *forged* instrument — *held*, not to be sufficient to put plaintiff on proof of defendant's signature; the word "forged," as used in the answer, being applicable to the note if written, in whole or in part, over defendant's genuine signature, without his consent. *Ibid.*
 12. Unless the denial is made before the trial is commenced (and perhaps before the cause is noticed for trial), it cannot be made at all except upon leave of the court first obtained. *Ibid.*
 - [13. Where papers signed by defendant had been made part of the record of a former trial of this action, and were treated by both parties as in evidence on the trial here in question, it *seems* that if the genuineness of defendant's signature to the note in suit had been put in issue, experts, as witnesses for the plaintiff, might properly have been permitted to compare the signature to the note with the signatures to such papers. Per TAYLOR, J.] *Ibid.*
 14. Under the circumstances of this case, *held*, that *the whole* of a certain statement, relied on by the respondent as admitted, must be considered as in evidence, or no part of it. *Diedrich v. N. W. U. Ry Co.*, 662
 15. In an action for damages for the taking of part of plaintiff's block in a city for a railway, a witness for plaintiff, who had acted for several years as his agent in looking after the block, had paid taxes, given leases and collected rents thereon, received offers to purchase, and was personally acquainted with the block both before and after the taking, *held*, competent to testify not only to the value of the strip taken, but also to the depreciation in value of the remainder of the block, by reason of the taking for railway purposes. *Ibid.*
 16. A witness who had testified fully as to the actual value of the whole block both before and after the taking, was asked what a particular front of said block was worth before the road was constructed. *Held*, that there was no error in excluding the question. *Ibid.*

17. Plaintiff having proven title to the land to the water's edge, defendant introduced evidence that the land taken was not above the water's edge, but was made beyond it by means of a breakwater and cribs extending into the water. *Held*, that there was no error in permitting plaintiff then to show that the breakwater and cribs were *not* built beyond the water's edge; the evidence being properly in rebuttal. *Ibid.*
18. In an action *de bonis asportatis*, where the answer is merely a general denial, proof of plaintiff's possession at the time of the taking is *prima facie* evidence of his title, and defendant cannot thereupon, by evidence, question the *bona fides* of plaintiff's purchase of the property from his vendor. *Kemp v. Seely*, 687

EXCEPTIONS. See CRIMINAL LAW, etc., 3. JUDGMENT (F.), 6. VERDICT, 10 (1).

EXECUTION.

See GARNISHMENT.

1. The circuit court for any county of this state has no authority to issue an execution to another county, except that conferred by statute (sec. 2971, R. S.; sec. 5, ch. 134, R. S. 1858), which authorizes the execution to issue to the sheriff of any county where the judgment is docketed. *Kentzler v. C., M. & St. P. R'y Co.*, 641
2. An execution, to be valid, must show on its face the authority to issue it; and, if issued by the circuit court for one county to the sheriff of another county, it is invalid if it fails to recite that the judgment is docketed in the latter county. *Smith v. Buck*, 22 Wis., 577, explained; and *Sabin v. Austin*, 19 Wis., 421, distinguished. *Ibid.*

EXECUTORS, etc. See ESTATES OF DECEDENTS.

FINDING OF FACT, by the Court.

In an action *de bonis asportatis*, where the answer was merely a general denial, and plaintiff had made *prima facie* proof of his title, not contradicted by any competent evidence, a finding that defendant did not take, carry away or convert the property of the plaintiff, *held* insufficient, because it does not determine the question of the taking, nor determine distinctly the question of title, if that was in issue. *Kemp v. Seely*, 637

FLOWAGE OF LAND. See PRESCRIPTION, 2.

FORCIBLE ENTRY AND UNLAWFUL DETAINER. See CONTRACTS, 8.

FORECLOSURE OF MORTGAGE.

See EQUITY, 1-4. JUDGMENT (F.), 7.

- 1 Under section 3162, R. S., a foreclosure sale of land cannot be made within a year from the date at which the judgment, as formally entered by the

- court through its clerk, is rendered perfect so as to show the total amount which must be paid in order to redeem, including not only the principal and interest of the mortgaged debt, but also the *costs taxed*. *Andrus v. Welch, imp.*, 132
2. Under secs. 8162-9, R. S., a foreclosure sale of land is not regular unless, prior thereto, the notice of sale has been published for six full weeks after the expiration of one year from the date of the judgment. *Kopmeier v. O'Neil, imp.*, 593
 3. In the absence of proof to the contrary, it will be *presumed* that publication of a notice of sale, made in a daily newspaper, was first made on the day of the *date* of such notice; and certain statements in the sheriff's certificate and printer's affidavit in this case are *held* not to rebut this presumption. *Ibid.*
 4. Where the published notice of sale is *dated* before the expiration of the year, there is at least an *apparent* irregularity in the proceedings, tending to defendant's injury; but whether, upon clear proof of *publication* of the notice at and for the time prescribed by statute, such apparent irregularity would be *fatal* to the sale, is not here determined. *Ibid.*
 5. Where the revision of 1878 took effect between the rendition of a foreclosure judgment and the time for giving the notice of sale, the provisions of such revision governed as to such notice (R. S., sec. 4980); and, where the judgment merely directed that it should be given "according to law and the practice of the court," a notice not given in conformity to secs. 3168 and 2993, R. S., was irregular. *Ibid.*
 6. The provision of sec. 2993, R. S., that a notice shall be posted in "three public places in the *town*," etc., *held* applicable to *cities*. Subd. 17, sec. 4971, R. S. *Ibid.*
 7. Where an order confirming a foreclosure sale is reversed on the appeal of one defendant, for irregularities in the sale, or on any grounds affecting equally all the defendants, it will be reversed as to all. *Kopmeier v. Larkin, imp.*, 598
 8. On appeal taken at the same time, by another defendant, from a further order in the same cause, denying his motion, made and decided *previous* to any order confirming the sale, that plaintiff be restrained from collecting any part of the deficiency upon the judgment after applying to it the proceeds of the sale: *Held*, that the order must be affirmed on the ground that the motion was *premature*, but without prejudice to appellant's right to renew the motion. *Ibid.*

FORECLOSURE OF TAX CERTIFICATE.

So much of ch. 181 of 1872 as authorizes an action to foreclose a tax certificate, is valid; and in such action the complaint need not set out the proceedings antecedent to the certificate, nor allege that no proceedings at law for the same purpose have been taken. *Durbin v. Platto et al.*, 484

FOREIGN ADMINISTRATOR. See ESTATES OF DECEDENTS.

FOREIGN CORPORATIONS. See INSURANCE COMPANIES.

FORFEITURE. See EQUITY, 5.

FRAUD.

See CHATTEL MORTGAGE, 3, 5, 6. COURT AND JURY, 2, 3. EQUITY, 7, 8. EVIDENCE, 18. JURISDICTION. VERDICT, 4.

Where farm crops seized on execution were claimed by the debtor's lessee of the land, under a lease for a term which would expire before any right to the land could be acquired under the judgment: *Held*, that the only question of fraud that could arise was, whether the lease was merely colorable, with an understanding between the parties thereto that the crops should enure to the lessor's benefit. *Ingram v. Rankin et al.*, 406

GARNISHMENT.

Garnishment in aid of an execution can be maintained only where the execution is valid. *Kentzler v. C. M. & St. P. R'y Co.*, 641

HOMESTEAD. See JUDGMENT (F.), 7.

HUSBAND AND WIFE. See MARRIED WOMAN.

INDIANS.

1. The jurisdiction of a state, when not restricted by existing treaties with Indian tribes, or by the act admitting such state into the Union, and except so far as it is restricted by the authority of congress under the federal constitution to "regulate commerce with the Indian tribes," extends to all members of such tribes within the territorial limits of the state.
State v. Doxlater, 278
State v. Harris, 298
2. The criminal laws of this state apply to the Indians on their reservations within the state; and the circuit court for Brown county has jurisdiction of all violations of such laws committed, whether by Indians or others, in the Oneida reservation, which is included within the boundaries of that county as fixed by law. *Ibid.*

INJUNCTION. See NAVIGABLE RIVER, 4.

INSTRUCTIONS TO JURY. See CRIMINAL LAW, etc, 1, 2, 8. JUDGMENT (F.), 2, 9, 10, 13, 16, 17. NEGLIGENCE, 3.

INSURANCE AGAINST FIRE.

1. A stipulation in an application for fire insurance, construed, in a doubtful case, most strongly against the insurer, by whom it was framed. *Redman v. Hartford Fire Ins. Co.*, 89
2. In a doubtful case, that construction of a contract which will save it, is to be preferred to one which will destroy it. *Ibid.*

3. The use of the word "warranty" in a contract will not always control its construction; as there may be a warranty without use of that word, and its use will not always create one. *Ibid.*
4. An application for insurance against fire, on a printed form furnished by the company, contained over a hundred interrogatories, with answers thereto, and a statement that the applicant covenants and agrees with the company "that the foregoing is a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, *so far as the same are known to the applicant and are material to the risk*; and the same is hereby made a condition of the insurance and a warranty on the part of the assured." The policy provides that the application "shall be considered a part of this policy, and a warranty by the assured." *Held*,
 - (1) That the stipulation in the policy that the application shall be considered a warranty by the assured, must be construed to mean *such* a warranty as is stipulated in the application itself.
 - (2) That the clause, "*so far as the same are known to the applicant*," etc., is not an *additional* stipulation that the assured has stated all facts known to him material to the risk, though not called for in the interrogatories; but it *qualifies* the preceding clause, changing it from an absolute covenant that all the answers are true, to a covenant that they are true "*so far as known*," etc.
 - (3) That in an action upon the policy, therefore, it cannot be held void merely because the application contains some false statements of fact, but it must be shown that these were known by the assured to be false, and were material to the risk. And as to a promissory or continuing undertaking, true when made but afterwards departed from, it must appear that the change increased the risk, and was thus material. *Ibid.*
5. To the question, what material was used in lubricating the machinery, the assured answered, "Lard and sperm oil;" and to the questions, whether the machinery was regularly oiled, and, if so, by whom and how often, the answer was: "Yes, by engineer and miller, as often as necessary." The proof was, that, during the whole life of the policy, an oil known as "Fine Engine Oil" was constantly used in the mill for lubricating purposes, and that the machinery was not usually oiled by the engineer or miller, but by another person specially employed by plaintiffs for that purpose. *Held*, that the insurer could not escape liability on these facts, without proof that the use of said "Fine Engine Oil," instead of lard and sperm oil, was known to the assured, or that the risk was increased by the fact that some person other than the miller or engineer usually oiled the machinery. *Ibid.*
6. After a policy of insurance against fire had expired, the assured spoke with the agent of the insurer, stated that he was going away, to be gone a week or ten days, and wanted to renew the insurance before he left; to which the agent answered, "All right." The assured then asked, "Won't you do it for two per cent?" being a reduction on the rate previously charged; and the agent said he would. The assured asked, whether there was anything else the agent wanted him to do; and the latter answered, "No, nothing else; I have the description in the office, and will attend to it." The assured said further that he wanted "to renew the old policy, the same as it was before, in the same company, to the same amount;" and the agent answered, "All right." The assured went away the same day, returning in about ten days; and the property was destroyed by fire the next day after his return. There is no other

proof of a renewal of the policy or the issue of a new one; the new premium was not paid; and the old policy contained a condition that it should be void if the premium remained unpaid, and that the insurance might be renewed provided the premium therefor should be paid, etc. *Held*, that the facts stated do not show a new contract of insurance in present, or a waiver of the conditions of the policy. *Taylor v. Phoenix Ins. Co. of Hartford*, 365

TAYLOR, J., dissects.

INSURANCE COMPANIES.

1. It is not the duty of the commissioner of insurance to prosecute insurance companies or their agents for penalties incurred by them under section 1974, R. S. *State ex rel. Southmayd v. Spooner, Comm'r, etc.*, 438
2. Said section 1974 provides that no corporation doing insurance business in this state, against which a final judgment shall have been recorded in any court of this state, shall, after sixty days from the rendition of such judgment, and whilst the same remains unpaid, issue any new policy; and ch. 171 of 1879 requires the commissioner of insurance to revoke the authority of any foreign insurance company to do business in this state, upon its persistent violation of any law regulating such corporations. *Held*, that where, after judgment against a foreign insurance company in a lower court, it has in good faith taken an appeal and given the required undertaking for payment of the judgment if affirmed, it is under no obligation to pay the judgment pending the appeal, and the statutes cited do not apply. *Ibid.*

INTEREST. See BILLS AND NOTES, 2, 3. PARTNERSHIP, 4. VERDICT, 12.

INTERPLEADER. See DAMAGES, 4.

JOINDER OF PARTIES. See ABATEMENT, etc., 3.

JUDGMENT.

(A.) *By Confession.*

1. In an action in a federal circuit court for a district of this state, on a judgment note, there was filed with the declaration, note and warrant of attorney in the usual form, an answer signed by an attorney on defendant's behalf, confessing that the amount claimed was due on the note, and releasing all errors; and there was annexed to the papers an affidavit of plaintiff's attorney, stating that the sum claimed was due upon the note, and also stating the sources of affiant's information or knowledge, and the reason why the affidavit was not made by the plaintiff in person. *Held*, a substantial compliance with secs. 13, 14, ch. 140, R. S. 1858. *Jewett v. Fink et al.*, 446
2. Such a judgment signed only by the clerk, but purporting by the record to have been rendered in open court, is *held* valid. *Ibid.*

(B.) *In Replevin.* See CHATTEL MORTGAGE, 2.

(C.) *Against Foreign Administrator.* See ESTATES OF DECEDENTS.

(D.) *Entry of Judgment.* See JUDGMENT (A.), 2.

1. Where a plaintiff would otherwise be entitled to have judgment entered by the clerk for the amount named in the summons, without an assessment of damages, under section 27, ch. 132, R. S. 1858 (Tay. Stats., 1501, § 32), the fact that there has been a *demurrer* to the complaint, which has been overruled (without order either for judgment or for leave to answer over), will not affect plaintiff's right to have judgment so entered. *Kirst et al. v. Wells*, 56
2. In an equitable action, where the court, by its written conclusions of law on file in the action, declares which party is entitled to judgment, and what judgment he is entitled to, a judgment entered by the clerk in accordance with such decision will not be reversed for want of a formal order directing its entry. *Stahl v. Gotzenberger*, 45 Wis., 121, and *Wadsworth v. Willard*, 32 id., 238, distinguished. *Seymour v. Laycock et al.*, 272

(E.) *Vacating Judgment.*

1. On appeal from an order denying a motion to vacate a judgment on default, where the motion was based entirely upon a verified answer and affidavits to excuse the default, this court cannot consider any alleged irregularities in the proceedings before judgment. *Union Lumbering Co. v. Board of Sup'rs, etc.*, 245
2. An application to set aside a judgment, and for leave to answer, is largely addressed to the discretion of the court; and unless the applicant has excused his default, and tendered a verified answer showing a good defense on the merits, this court will not reverse an order denying the application. *Ibid.*

(F.) *Reversal of Judgment.*

See BASTARDY ACT, 2. COURT AND JURY, 1. CRIMINAL LAW, etc., 7, 8. DAMAGES, 2. DEED, 2. REFERENCE, 4. REPLEVIN, 2. VARIANCE. VERDICT, 12.

1. Although this court will not ordinarily reverse the action of the court below on subjects resting in its discretion, yet this rule does not apply where there has been an abuse of discretion, or that court has apparently acted under a mistaken view of the law. *Churchill v. Welsh*, 39
2. The refusal of special instructions correct in principle and applicable to the case, *held* no error where the same instructions were substantially given in the general charge. *Urbanek v. C., M. & St. P. R'y Co.*, 59
3. While in actions for injuries from trains at railroad crossings, testimony that the witnesses *did not hear* a signal given by blowing the whistle, is not, as a rule, so conclusive as testimony of the same number of witnesses that they *did* hear it, yet this rule may be greatly modified in a given case by the character and interest of the witnesses, their means of knowledge and manner of testifying, and other circumstances; and in this case there is no such preponderance of evidence against the special finding of the jury on that question, as will warrant a reversal of the judgment. *Ibid.*
4. Where the objectionable portion of a witness's evidence was not responsive to any interrogatory, and there was no motion to exclude it from the jury, it is not ground of reversal. *Ibid.*

5. The rejection of proper evidence is not ground of reversal, where the witness was afterwards permitted to testify fully upon the subject. *St. Maries v. Pollrys et al.*, 67
6. Defendant's motion for judgment on the findings having been granted against objection, and plaintiff's motion for a new trial, based in part on the defects in the findings, overruled, exceptions to these rulings bring the findings before this court for review, on appeal; and the judgment is reversed for the defects in such findings. *Cotzhausen v. Simon*, 103
7. In foreclosure of a mortgage, so much of the judgment as provides for selling first that part of the premises which was not included in the mortgagor's homestead, appearing to be for his benefit only, error in admitting evidence taken by plaintiff *ex parte* to show that a part of the premises was homestead, and that the remainder could be sold separately without injury, is not ground of reversal. *Abbott et al. v. Johnson, imp.*, 239
8. Error in admitting an instrument in evidence without proof of its execution, is cured by subsequent proof of such execution, admitted without objection. *Woodruff et al. v. King*, 261
9. The instructions given herein, taken together, containing a full and correct expression of the law as above stated, and any defect in single instructions not being such as could have misled the jury to the appellant's prejudice, such defect is not ground of reversal. *Ibid.*
10. It is not error for the court, upon the coming in of the jury for that purpose, to read its instructions to them a second time, in order to satisfy one or all of the jury as to the true state of the law upon the issues before them. *Ibid.*
11. In this case there was evidence to support the verdict; and this court cannot hold that the court below abused its discretion in refusing a new trial. *Kidd v. Fleek*, 443
12. In slander, no question having been made by plaintiff in the court below upon the degree of evidence necessary to support the defendant's justification, the question cannot properly be raised here. *Ibid.*
13. A judgment will not be reversed for an instruction which was not erroneous when taken in the sense in which the jury must have understood it. *Ibid.*
14. Where plaintiff was not required by law to prove a signature, specific errors in the admission of evidence offered by him for that purpose cannot be alleged by defendant to reverse the judgment. *Smith v. Ehnert*, 479
15. Where the bill of exceptions does not contain all the evidence, the judgment will not be reversed upon an objection first taken here, which might have been shown by such bill to be groundless, if it had been taken in the court below. *Barkow v. Sanger et al.*, 500
16. A motion for a new trial of an action, made at the term of trial, based in whole or in part upon alleged errors in specified instructions, brings up such instructions for review, upon appeal from a judgment rendered upon the verdict after a new trial had been denied. *Ibid.*

17. But where exceptions are not taken *at the trial*, the judgment will not be reversed for instructions technically erroneous, unless it clearly appears from the whole record that appellant was prejudiced by them. *Ibid.*

JURISDICTION.

See ABATEMENT, etc., 1, 2. APPEAL (B.), 1-9. APPEAL (C.), 2. CORPORATIONS (A.), 2. CRIMINAL LAW, etc., 3. EXECUTION. INDIANS. SUPPLEMENTARY PROCEEDINGS, 1, 2.

1. Where the defendant in a civil action has been induced by plaintiff's fraudulent representations to come within the jurisdiction of the court, the summons then served upon him will be set aside, although the design of the representations was to obtain his arrest upon a criminal charge, and the institution of the civil action was an afterthought. *Townsend v. Smith*, 623
2. *It seems* that in such a case the action should be dismissed even after defendant has made a voluntary general appearance therein; but whether there was such an appearance in this case, is not determined. *Ibid.*

JUSTICES' COURTS. See APPEAL (C.).

LACHES. See APPEAL (B.), 10.

LANDLORD AND TENANT. See CONTRACTS, 3, 7. EQUITY, 6, 7. FRAUD.

LIBEL.

1. P., a citizen of Milwaukee, agreed with a creditor in another city that the latter should draw on him for the amount due, through a Milwaukee bank. The draft was sent to such bank, and, without having presented it to the drawee, the cashier of the bank sent it back to the drawer with these written words: "We return unpaid draft [describing it]. He [the drawee] pays no attention to notices." In an action by P. against the cashier for libel, *Held*,
 - (1) That these words (notwithstanding *innuendoes* in the complaint to enlarge their meaning) must be construed to mean merely that plaintiff paid no attention to notices given him *in regard to that draft*.
 - (2) That, as plaintiff was only bound to accept and pay the draft *on presentation*, the words do not impute to him any want of integrity, and are not actionable *per se*. *Platto v. Geilfuss*, 491
2. A publication which charges that a person, while formerly holding the office of sealer of weights and measures and inspector of scales for a certain city, "tampered with" or "doctored" such weights, measures and scales, for the purpose of increasing the fees of his office, is *prima facie* libelous, as tending to bring the accused into public hatred or contempt. *Eviston v. Cramer et al.*, 659
3. On demurrer to a complaint in libel which alleges that defendant made such charges against plaintiff "falsely, wickedly and maliciously," the

question whether the publication was *privileged* does not arise; as privilege does not extend to false charges made with improper motives or express malice. *Ibid.*

LIEN.

On Timber, etc.

1. Ch. 154 of 1862 (Tay. Stats., 1768, § 25) in terms gives a lien on "logs and timber," for labor performed thereon, whether done for the owner or his representative, or for a stranger; but it gives no lien upon *lumber* for such labor; and such a lien can only be enforced under the general statute concerning the liens of mechanics and others (R. S. 1858, ch. 153, sec. 12), which applies only to labor performed for or on account of the owner or his agent or assignee, or a subcontractor. *Babka v. Eldred et al.*, 189
2. Laths are lumber, and are *not timber* within the meaning of the act of 1862. *Ibid.*
3. In this action for a lien for work performed in a county to which the act of 1862 applies, the court found that plaintiff worked for the defendant W. "in sawing slabs out of logs for lath;" that a certain sum was due him for such work; and that "the logs and lath upon which said labor was performed, were then and are the property of defendants E." *Held*, that these findings do not show plaintiff entitled to a lien upon the *lath*, as against the defendants E. *Ibid.*
- [4. The constitutionality of the act of 1862, or of the provisions thereof giving justices of the peace jurisdiction of actions to enforce the liens there provided for, not here considered.] *Ibid.*

LIMITATION OF ACTIONS.

See PRESCRIPTION. TAXATION, etc., 4.

The statute limiting the time for bringing an action to recover damages for an injury to property (R. S., sec. 4222), runs against a right of action *in the state* in the same manner as against a right of action in a private person (sec. 4229); and one who purchases lands of the state, while he takes therewith (under ch. 520 of 1865) whatever rights of action the state may have for past trespasses upon such lands, cannot recover for a trespass upon which the period of limitation had run while title was in the state. *Coleman v. Peshtigo Co.*, 180

MANDAMUS.

See CORPORATIONS (A.), 7.

A petition for a *mandamus* to compel a circuit judge to make a further return on appeal, alleged that the petitioner took oral exceptions, on the trial, to the failure of the court to give certain instructions prayed by him. The judge's return to the alternative *mandamus* states that he rejected the instructions, substituting his own general charge, "to which

action of the court no exception was taken," and further, that the bill of exceptions signed "fully and fairly states all the facts attending the trial, to the best of his knowledge, belief and remembrance." *Held, not evasive*, but a satisfactory return, and conclusive upon this court. *State ex rel. N. W. U. R'y Co. v. Small, Circuit Judge,* 436

MARRIED WOMAN.

A married woman, having at the time no separate estate, purchased a farm of a stranger entirely on credit, giving her notes for the price, secured by mortgage of the property. Her husband lives with her on the farm, and controls the farm labor, carrying on the business in her name and as her agent, without any agreement as to his compensation for such services, and from the proceeds of the crops raised on the farm she has paid one year's interest on the purchase money, and a certain amount of the principal. The purchase by her having been made in good faith, and not as a means of fraudulently placing the husband's property beyond the reach of his creditors: *Held*, that under the statutes of this state (ch. 44, Laws of 1850, and ch. 155, Laws of 1872; R. S. 1878, secs. 2342-3), crops raised upon said farm by their joint labor and management, belong to the wife, and are not subject to sale for the husband's debts. *Feller v. Alden*, 23 Wis., 301, followed, and *Lyon v. Railway Co.*, 42 id., 548, distinguished. *Dayton v. Walsh*, 113

MASTER AND SERVANT. See RAILROADS, 1. SHIPPING.

MERCANTILE AGENCY. See CONTRACTS, 8.

MILL DAMS. See PRESCRIPTION, 2.

MISREPRESENTATION. See VERDICT, 4.

"MONEY." See BILLS AND NOTES, 6.

MORTGAGE.

See BILLS AND NOTES, 4. DEED, 1, 2. FORECLOSURE OF MORTGAGE.

- Where the advances to secure which a note and mortgage were transferred as collaterals have been paid, a subsequent satisfaction of the mortgage upon the record, by the mortgagee, is valid, although the mortgagor, when he paid the note and procured the satisfaction to be entered, knew that the instruments had been so transferred. *Seymour v. Laycock et al.*, 272

MOTION.

See APPEAL (B.), 3, 4, 10. CHANGE OF VENUE, 1. FORECLOSURE OF MORTGAGE, 8. JUDGMENT (F.), 4, 6, 16, 17. PRACTICE, 3. SUPPLEMENTARY PROCEEDINGS, 7.

MUNICIPAL COURT. See CRIMINAL LAW, etc., 16.

NAVIGABLE RIVER.

1. A riparian owner on navigable water, in this state (whether or not the owner of the soil under the water), may construct in front of his land, in shoal water, proper wharves, piers and booms, in aid of navigation, at his peril of obstructing it, far enough to reach actually navigable water; but this right is subordinate to the public use of the water, and may be regulated or prohibited by law. *Cohn v. Wausau Boom Co.*, 314
2. Ch. 45, P. & L. Laws of 1871, amended by ch. 256 of 1873, grants to defendant the exclusive right of constructing booms for holding, storing and assorting logs, etc., for a certain distance up and down the Wisconsin river; but, while it authorizes defendant's works in aid of the boom to extend, in the water, up and down the river, fronting its own lands and those of other riparian owners, excluding all other booms, within the limits specified, it does not attempt to authorize the use by defendant of *any part of the bank* of the river owned by others; and this could not be done for a private use, nor for a public use without just compensation. *Ibid.*
3. The chief navigable value of the Wisconsin river being for the floating of logs to market, booms like that authorized by the statute being necessary for that use, and the statute giving an equal right in the use of defendant's works to all the world, defendant is held to be a *quasi* public corporation, and its franchises to be granted for a public use; and the prohibition of other riparian owners on the same river, within the specified limits, from constructing booms therein (a prohibition implied from the exclusive grant to defendant) is a valid exercise of the paramount public right. *Ibid.*
4. If defendant's works have been so constructed as to impede the general navigation of the river, in violation of its franchise, a suit in equity by a private person (for an injunction, etc.) is not the proper remedy; and if defendant has so used its works in handling rafts or logs as to give a private right of action, the action must be at law, for damages. *Ibid.*

NEGLIGENCE.

See RAILROADS. SHIPPING.

1. M., a young and vigorous man, whose sight and hearing were sound and unimpaired, being at a point about 253 feet west of a railroad, in a village, and having his horses hitched on the same street about 225 feet east of the railroad, heard the long whistle of an approaching locomotive engine, and immediately commenced running down the street towards his horses. At that time the train was about a half a mile distant from the street crossing, and it whistled again when about a quarter of a mile distant; it was hidden from M.'s sight until he was within about twenty feet of the track, when he might have seen it by looking in that direction; and, being a light special train, it was running about forty miles per hour, and without ringing the bell on its approach. The passenger trains of the company usually run at the rate of twenty miles, and its freight trains at the rate of twelve miles per hour; and a freight train was due near that time. M. did not cease running, or diminish his speed, until he was in the act of stepping on the first rail of the main track, when he was struck by the train and killed — the whistle for the brakes being

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sounded at the same moment. The jury, by special verdict, found that M., after hearing the whistle and the noise of the train, and seeing it, attempted to cross the track in front of the locomotive; that if he had stopped just before going upon the land included within defendant's right of way, and looked in the proper direction, he could have seen the train; and that he was not guilty of any want of ordinary care in running upon the track as he did. *Held*, that, in view of the evidence, these findings are *inconsistent*, and it was error to refuse a new trial. *Kearney, Adm'r, v. C., M. & St. P. R'y Co.*, 144
TAYLOR, J., dissented.

2. Contributory negligence of the *driver* of a private conveyance in which a person is voluntarily riding at the time of receiving an injury from a defective highway, is imputable to the person so injured, to prevent a recovery. *Otis v. Town of Janesville*, 422
3. In an action for injuries caused by negligence, the court, after charging that "slight negligence" (which means in the law a want of extraordinary care) would not prevent a recovery, but that a "want of ordinary care" would do so, if it "contributed in any material degree to produce the injury," refused to charge that a "slight want of ordinary care," in consequence of which the injury occurred, would have that effect. *Held*, misleading and therefore error. *Ibid.*
4. In an action for injuries from negligence, the jury, by special verdict, found that negligence of the person injured contributed materially to the injury, and also found specially that, "in the exercise of ordinary care and prudence," he might have done a certain act, which, if done, would or might have saved him from the injury; and there was neither finding nor proof of any other facts tending to show contributory negligence. The special fact so found not being such that it can be said, *as matter of law*, to establish contributory negligence: *Held*, that the court below should have granted a new trial on plaintiff's motion, instead of rendering judgment for the defendant on such verdict. *Cottrill, Adm'r, v. C., M. & St. P. R'y Co.*, 634

NEW TRIAL.

See JUDGMENT (F.), 6, 16, 17. NEGLIGENCE, 1, 4. PRACTICE, 3. REPLEVIN, 2.

When a motion for a new trial has been granted, the moving party may *waive* his right under the order, without prejudice to his right to *appeal* from the judgment afterwards entered. *Gutswillig v. Stumes*, 428

NOTICE.

1. *Of Appeal*. See APPEAL (B.), 1-5.
2. *Of Commencement of Proceeding*. See SUPPLEMENTARY PROCEEDINGS, 4-6.
3. *Of Foreclosure Sale*. See FORECLOSURE OF MORTGAGE, 2-6.

NOVATION OF CONTRACT. See CONTRACTS, 1.

NUISANCE. See NAVIGABLE RIVER.

OATH. See REFERENCE, 4.

OFFICER. See CLERK OF COURT. CRIMINAL LAW, etc., 9, 10. DRAINAGE FUND. INSURANCE COMPANIES.

ORDERS. See APPEAL (B.), 1, 2, 10. CHANGE OF VENUE, 1. CLERK OF COURT. FORECLOSURE OF MORTGAGE, 8. PRACTICE, 3.

ORDER, REVERSAL OF. See FORECLOSURE OF MORTGAGE, 7. JUDGMENT (E.). SUPPLEMENTARY PROCEEDINGS, 7.

PARTIES. See ABATEMENT, etc. DAMAGES, 3. EQUITY, 7.

PARTNERSHIP.

See APPEAL (B.), 6.

1. In an action for dissolution of a firm consisting of four members, it was error to determine the rights and liabilities, as between themselves, of two members of the firm, growing out of their relations *as partners in another firm*, consisting of those two only. *Dimond v. Henderson, imp.*, 172
2. The maxim, *Omnia præsumuntur contra spoliatorem*, applied to a defendant who, being employed upon a salary to keep the books of the firm of which he was a member, kept them in such a manner as to render it impossible to determine correctly the state of the accounts between the partners. *Ibid.*
3. It appearing, in such a case, that goods sold by weight or measure were taken from the store to be used in said defendant's family, without having been weighed or measured, and that the accounts as shown by the books could therefore not be relied upon as accurate in that respect, the referee for trial did not err in resorting to other sources of information in order to get at the real amount and value of goods so used. *Ibid.*
4. While it is the general rule that one partner is not chargeable with interest on moneys of the firm in his hands, until a balance has been struck or an accounting had (*Marsh v. Fraser*, 37 Wis., 149; *Yates v. Shephardson*, 39 id., 173), yet, where one partner kept the account books, and knew, or ought to have known, the precise amount in his hands belonging to the firm, and made at one time what purported to be a full statement of the business, which was incorrect: *Held*, that there was no error in charging him with interest. *Ibid.*
5. One partner may execute a chattel mortgage of the firm property to secure a partnership debt, without the consent of his copartner; and his attaching a seal to the instrument, being unnecessary, will not affect its validity. *Woodruff et al. v. King*, 261
6. Where, on the dissolution of the firm of A. & B., A. became owner of certain chattels formerly belonging to the firm, a subsequent mortgage of such chattels in the firm name by B. would convey no title, if, prior thereto, the mortgagees had *personal* notice of the dissolution, or due public notice thereof had been given. *Ibid.*

7. A chattel mortgage in the usual form from A. to B. is not evidence tending to show the existence of a *partnership* between them at its date. *Benjamin v. Covert, imp.*, 375
8. In an action to charge two persons as partners, if plaintiff shows that a partnership existed between them at a certain time, and was known to the public at the place of business of the firm, and that no notice of dissolution was ever given, he may further show that at the time of the transaction in question such partnership, to plaintiff's knowledge, was *generally reputed to continue*, and that the debt was contracted in the firm name, and upon the credit of the firm, though after a dissolution in fact; it being then for the jury to determine whether the retiring partner had so acted after the dissolution as to hold himself out as still a partner, and had thus rendered himself liable. So *held* where the firm name was the same as the individual name of the person who continued the business, and where the plaintiff had never done business with the firm during its actual existence. *Ibid.*
9. The taking, not as payment, of the individual note of one partner for money loaned, though it may be evidence that the loan was not made to the firm, is not conclusive of that fact. *Hoflinger v. Wells*, 623
10. Where such individual note of one partner is taken for a loan made *at the time* to the firm, the *presumption* is that it was *not* taken as payment. A remark in *Ford v. Mitchell*, 15 Wis., 304, doubted, but distinguished. *Ibid.*
11. The complaint avers, in substance, that, on etc., S., as partner in the then existing firm of W. & S., borrowed from plaintiff, for and on account of and for the use of said firm, a certain sum, which loan was evidenced by a note for the amount, signed by S., dated on the same day; and that the money so loaned was expended for the use of the firm. *Held*, that, under these averments, plaintiff may show that the money was loaned by him to and upon the credit of the firm; there is no admission that the note was taken in payment; and the complaint is good on demurrer. *Ibid.*

PAUPERS. See COUNTIES, 1-3.

PERJURY. See CHANGE OF VENUE, 2, 8.

PLEADING.

See ABATEMENT, etc., 3. CITIES, 3(1). EQUITY, 7. FORECLOSURE OF TAX CERTIFICATE. PARTNERSHIP, 11. PRACTICE, 1, 2.

1. In an action against a single defendant, by the grantee in a tax deed of a single tract of land, based upon a tax sale in 1869, a tabular statement annexed to and made a part of the complaint sets out the dates of the sales of said tract for taxes in 1871 and several following years, with the amount for which it was sold in each of said years, the dates of redemption, and the name of the owner at the time of each of said sales; but does not show any fact in regard to the sale of 1869. The complaint avers that said tabular statement shows "the names of the former owners of each separate tract or parcel of land, at the time of the sale of the lands aforesaid for said delinquent taxes, and the name of each and every person claiming under such former owners, so far as the plaintiff

can ascertain the same;" and that "all the defendants herein whose names appear against each separate tract or parcel of land have or claim some interest in such separate tract of land, and that the said defendants are the only persons who claim any interest in said land adverse to that of the plaintiff." *Held*, that this is not equivalent to an averment that when the action was commenced defendant had or claimed an interest in the land, under the owner at the time of the tax sale; and that, in the absence of such an averment, the complaint does not state a cause of action against the defendant, under ch. 22 of 1859. *Comstock v. Ludington*, 229

2. In an action against a county board of supervisors to avoid taxes as illegal, defendants cannot deny on information and belief averments of facts appearing from the public records of the county and its towns: as, that the town assessors neglected to take, subscribe and annex to the assessment rolls, the prescribed oath; that the members of the board of equalization were not sworn before entering upon their duties, and did not make the affidavit required by law after performing their duties; that the certificates and statements required by statute were not made by the town clerk and secretary of the board of education (where the town system of school government had been adopted); and that the delinquent rolls of the towns were not properly authenticated. *Union Lumbering Co. v. Board of Supervisors, etc.*, 245
3. In an action by one town against another in the same county, to recover drainage moneys of the plaintiff town wrongfully received by defendant and appropriated to its own use, averments that all the swamp lands upon the sale of which said funds were received, were, at the time of such sale, situated in the plaintiff town, and none of them within the limits of the defendant town, followed by a general averment that the money belonged to the plaintiff, construed to mean that said lands were within the limits of the plaintiff town as those limits existed at the commencement of the action; where it appeared that when the lands were sold, the plaintiff town included the whole area of the county. *Town of La Pointe v. Town of Ashland*, 251
4. The want of any averment in the complaint that the county clerk made a distribution of the drainage moneys in the hands of the county treasurer, amongst the several towns of the county, as required by statute, *held*, on demurrer, to be cured by an averment that the county treasurer duly passed said moneys to the credit of the plaintiff town, and paid them to its treasurer. *Ibid.*
5. A demurrer to the relator's answer to the return to an alternative *mandamus*, treated as a demurrer to the relation. *State ex rel. Cuppel v. Mil. Chamber of Commerce*, 670

PLEDGE. See MORTGAGE.

PRACTICE.

See ABATEMENT, etc. ACTION (B.). APPEAL. CHANGE OF VENUE. COSTS. COURT AND JURY. CRIMINAL LAW, etc. DAMAGES, 1-4. EQUITTY, 7. EVIDENCE, 10-12, 17, 18. EXECUTION. FORECLOSURE OF MORTGAGE. FORECLOSURE OF TAX CERTIFICATE. GARNISHMENT. JUDGMENT. JURISDICTION. NEW TRIAL. PLEADING. REFERENCE. SUPPLEMENTARY PROCEEDINGS. VARIANCE. VERDICT.

1. In an action by nonresident plaintiffs on book account for goods sold and delivered, a verification by the attorney on his belief states that "such belief is founded upon the admissions of the defendant that *said bill* is correct, and said amount due thereon, and upon communication had from plaintiffs in relation thereto." *Held*, that the words "*said bill*" (no "bill" being mentioned in the complaint) must be understood of said account, and that the statement of the grounds of belief is sufficient. *Kirst et al. v. Wells*, 56
2. On appeal to the circuit court from the decision of a county board of supervisors rejecting plaintiff's claim for moneys paid for illegal taxes, where there were no formal pleadings, the judgment for plaintiff was based upon defendant's *stipulation*, admitting all the facts necessary to establish the claim, and a referee's *computation* of the amount paid, with interest. *Held*, that the record shows a *trial* of the issues, and not a mere judgment in default of an answer. *Webster v. Board of Sup'rs. etc.*, 225
3. After denial of a motion for a new trial, without leave, granted *at the same time*, to renew the motion, a second motion for the same relief, made *on substantially the same grounds*, without disclosure of any new facts, cannot properly be granted; the question being *res adjudicata*. *Rogers v. Hanig*, 46 Wis., 361. *Ibid.*
4. A compliance with the terms upon which a continuance is granted, and an acceptance of the benefit of the continuance, are a *waiver* of any objection to such terms. *Abbott et al. v. Johnson, imp.*, 239

PRESCRIPTION.

1. In this state *prescription* and *limitation* are substantially alike in their legal effects, both conferring title; and the period of prescription follows that of limitation fixed by statute. *Scheuber v. Held et al.*, 340
2. A prescriptive right to flow lands by a mill-dam may be acquired by twenty years' uninterrupted user; and under sec. 26, ch. 138, R. S. 1858, where the twenty years had expired before the passage of ch. 105 of 1877, it conferred such prescriptive right even as against *the state*. *Ibid.*

PRESUMPTION.

See APPEAL (B.), 6. BILLS AND NOTES, 5 (1). COSTS, 4, 6. CRIMINAL LAW, etc., 8. DEED, 5. FORECLOSURE OF MORTGAGE, 3. PARTNERSHIP, 2, 10. VERDICT, 12.

PRINTED BRIEF AND CASE. See APPEAL (A.), 2.

PROBATE COURT. See APPEAL (B.).

PROMISSORY NOTES. See BILLS AND NOTES.

QUORUM. See COUNTIES, 7.

RAILROADS.

See JUDGMENT (F.), 3. NEGLIGENCE, 1.

1. Ch. 173 of 1875 (which makes each railroad company of this state liable for damages sustained by any agent or employee thereof, while in the line of his duty as such, caused by the negligence of any other agent or employee of such company in respect to his duty as such, where the negligence of the person so injured does not materially contribute to the result), is valid, although it does not impose a similar liability upon other corporations or persons. *Diberner v. C., M. & St. P. R'y Co.*, 138
2. Plaintiff was employed as a section hand to work about defendant's depot yard in a city, and, while he was engaged, under direction of defendant's foreman, in driving a spike to hold a rail on one of the tracks in the yard, an engine used in the yard to make up trains, backed cars along the track on which he was at work with his back toward the train, and struck and injured him. The special verdict was, that plaintiff knew, when driving the spike, that the switch-engine was switching cars and making up trains in the yard, and was liable to be run on any track, but did not know that the cars were being put on the track upon which he was at work; that it was the custom for the engineer to ring the bell on the switch-engine when it was in motion; that the bell was rung, and heard by the plaintiff five minutes before he was injured, as the engine passed along a side track to his rear, but was not rung after the engine commenced backing toward him; that he had no reason to assume that it would not be run on the track where he was at work; that it was necessary for plaintiff, when driving the spike, to stand with his back to the approaching train; that, when taking that position, he did not look or listen for the train; and that if he had done so, he might have avoided the injury. The jury further found that the engineer of the switch-engine was negligent in not ringing the bell when backing his train towards the plaintiff; that such negligence caused the injury; and that, under all the circumstances, plaintiff was not guilty of any want of ordinary care. *Held*, that the court cannot say, as matter of law, that plaintiff was guilty of negligence in relying upon the custom as to ringing the bell, and so failing, under the circumstances, to look or listen for the cars; and the question of contributory negligence was therefore properly submitted to the jury. *Ibid.*
3. It was also for the jury to determine whether the failure of the engineer to ring the bell while backing cars toward the plaintiff, was negligence. *Ibid.*
4. It is the settled law of this state, that while a slight want of ordinary care on plaintiff's part will defeat such an action as this, it will not be defeated by "slight negligence" on his part; that phrase properly denoting a want of *extraordinary* care. *Ibid.*
5. In determining whether a locomotive engineer, injured by a collision while running a train upon a railway, was guilty of negligence in remaining at his post and not jumping off before the collision, the standard of ordinary care and prudence on his part must be fixed with reference to the peculiar responsibilities of his employment. *Cottrill, Adm'r, v. C., M. & St. P. R'y Co.*, 634
6. The mere facts that such an engineer, running a train upon a railroad, after seeing a signal to stop, and after reversing his engine, might, with probable safety to himself, have gotten off from his locomotive before its

collision with another train then approaching, and that he remained at his post grasping the reversing lever and throttle until the collision occurred, will not justify the court in holding, as matter of law, that he was negligent. *Ibid.*

RAPE. See CRIMINAL LAW, etc., 1, 2.

RECEIPT. See CONTRACTS, 8.

RECEIVER. See SUPPLEMENTARY PROCEEDINGS, 4-8.

RECORD. See REFERENCE, 4.

RECOUPMENT. See VENDOR AND PURCHASER.

REDEMPTION. See EQUITY, 4.

REFERENCE.

See PRACTICE, 2.

1. If it appear from the pleadings that the trial of any issue of fact in a cause requires the examination of a long account, a compulsory reference may be ordered, under the statute. *Monitor Iron Works Co. v. Ketchum et al.*, 177
2. The action was for work and materials, and the bill of particulars contained hundreds of items, each charged at a separate price. The answer did not deny that plaintiff did the work and furnished the materials, nor directly controvert the prices charged therefor; but it set up a special contract, by which plaintiff was to furnish defendants with certain machinery at a stipulated price, and alleged that such price had been fully paid, and that a large portion of the work and materials charged in said bill of particulars was done and furnished under such contract. It became necessary, therefore, to examine the account, item by item, to ascertain which items (if any) were, and which were not, included in the special contract. *Held*, that this made a compulsory reference proper. *Ibid.*
3. The answer also contained a counterclaim for two sums of money, and another for goods, wares, merchandise, freight, work, labor and services, upon which issue was joined. *Held*, that the issues on the counterclaim alone would probably justify a compulsory reference. *Ibid.*
4. The mere fact that it *does not appear from the record* that the referee for trial was *sworn*, is not ground for reversal. *Gilbank v. Stephenson*, 31 Wis., 592. *Ibid.*

REFORMATION OF DEED. See EQUITY, 5.

REPEAL OF STATUTE. See FORECLOSURE OF MORTGAGE, 5.

REPLEVIN.

See CHATTEL MORTGAGE, 1, 2. VERDICT, 7.

1. On trial in the circuit court of an action of replevin commenced in justice's court, where plaintiff had obtained possession under the statute, it ap-

peared that defendant claimed under a chattel mortgage; and the evidence was such that the jury might have found due on the mortgage either \$18, or ninety cents, or nothing. The jury found that defendant was "entitled to the possession" of the property, and assessed its value at \$90, and defendant's damages at ninety cents. The judgment was, that defendant recover ninety cents damages, and the costs, and that he "have and retain the possession of said property," and that the officer return it to him. *Held*, error, in that the verdict and judgment should have determined the value of defendant's *special interest* in the property. *Burke v. Birchard*, 35

2. The jury having found that there is something due on the mortgage, and the proof being that the sum unpaid must be at least ninety cents, the cause is remanded with directions that defendant be permitted, at his option, to take simply a judgment for that sum as damages, with costs; and that otherwise there be a new trial. *Ibid*.

RES ADJUDICATA.

See PRACTICE, 3.

1. In an action against merely *joint* contractors, where only one appeals from a decision of the circuit court (as upon a demurrer to the complaint), the determination by the appellate court of a question necessarily involved in its judgment upon such appeal, and in respect to which the rights of all the defendants are the same, is binding upon them all in subsequent proceedings in the action. *Bowen v. Hastings et al.*, 232
2. The decision of this court on a former appeal by one of the defendants herein (*Bowen v. Van Nortwick, imp.*, 38 Wis., 279), as to the effect of a certain contract and assignment, not only followed as *res adjudicata*, but explained and approved. *Ibid*.

RESCISSION OF CONTRACT. See EQUITY, 1.

REVIVOR OF ACTION. See ABATEMENT, etc., 1, 2.

RULES OF SUPREME COURT. See APPEAL (A.), 2.

SALE.

1. *Of Chattels*. See DAMAGES, 5, 9-11. VERDICT.
2. *Of Land*. See VENDOR AND PURCHASER.
3. *On Foreclosure*. See FORECLOSURE OF MORTGAGE. FORECLOSURE OF CERTIFICATE.
4. *For Taxes*. See TAXATION, etc., 4, 7.

SHIPPING.

1. It is a general rule, applicable to all kinds of service, that a master who negligently fails to furnish his servant with safe machinery, means and appliances for doing the work required to be done, is liable for injuries to the servant caused by such negligence. *Thompson v. Hermann et al.*, 602

2. The common seaman in a vessel at sea is bound to submit to the judgment and discretion of the master, and obey his orders, in the management of the vessel and its repairs, especially in rough weather and cases of emergency; and the fact that the seaman, on receiving from the master an order otherwise lawful, and being imperatively commanded to perform it in a manner or by means which he regards as unnecessarily dangerous, does not refuse to so perform it, or undertake then and there to withdraw from the service, will not prevent his recovering for personal injuries caused by the master's fault. *Ibid.*
3. The owners of a vessel, as well as the master, are liable for injuries caused by the negligence or unskilfulness of the master, provided the act be done within the scope of his authority as such. *Ibid.*
4. Where a vessel was arrested by process in admiralty issued at the suit of the master and another person, and her voyage and employment interrupted until she was released by her owners: *Held*, that this act of the master terminated his employment as such, at the election of the owners. *Budge v. Mott et al.*, 611
5. The master, having been made one of the libellants of his own vessel, and, with knowledge of the fact, having done nothing towards dismissing the suit or releasing the vessel, cannot be heard to deny that he was a party to the proceeding, on the ground that he professed disapproval of it. *Ibid.*

SIGNATURE, DENIAL OF. See EVIDENCE, 10-12.

SLANDER. See EVIDENCE, 5-8.

To sustain a justification in slander, it is not necessary to satisfy the jury beyond reasonable doubt. *Kidd v. Fleck*, 443

"SLIGHT NEGLIGENCE." See NEGLIGENCE, 3. RAILROADS, 4.

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" 151, sec. 12,	- - -	395, 396	Sections 4035, 4089,	- - -	478
" 153, " 12,	- - -	189, 190	Section 4165,	- - -	196
REVISED STATUTES OF 1878.			" 4166,	- - -	193, 196
Sections 253-4,	- - -	214	" 4192,	- - -	481
Section 255,	- - -	255	" 4204,	- - -	236
" 670,	- - -	332, 334	" 4206,	- - -	350
" 672,	- - -	334, 336	" 4208,	- - -	350
Sections 705, 1080, 1091, 1110,	223		" 4219,	- - -	183
			Sections 4222, 4229,	- - -	180, 183
			Section 4269,	- - -	421
			" 4566,	- - -	297

STATUTES CITED, Etc. — (continued).

REVISED STATUTES OF 1878 — (con.)			TAYLOR'S STATUTES — (con.)		
Sections 4680, 4685,	-	536, 543	Page 506, § 122,	-	302
Section 4720,	-	529	" 1499, § 25,	-	178
" 4721,	-	549	" 1501, § 32,	-	56, 58
" 4724,	-	530	" 1506, § 44,	-	442
" 4739,	-	549	" 1531, § 54, subd. 4,	648, 649	
" 4971, subd. 17,	593, 597		" 1531, § 55,	-	56, 59
" 4978,	-	597	" 1534, § 69,	-	647, 648
" 4980,	-	593, 597	" 1535, § 73,	-	647, 648
TAYLOR'S STATUTES.			" 1651-2, §§ 13, 14,	-	451
Page 502, § 108,	-	299, 306	" 1768, § 25,	-	189, 190

STATE ROADS.

1. Ch. 223 of 1875, which provides for laying out a state road in Polk and Burnett counties, though it may impose upon each of said counties the expense of *laying out* such road therein, does not impose upon it the expense of opening the road, but apparently leaves that expense to be a charge upon the several towns under the general statutes. *Jensen v. Board of Sup'rs*, 298
- [2. *It seems* that the neglect of the commissioners appointed by said act to give the notice required by sec. 93, ch. 152 of 1869 (Tay. Stat., 502, § 108) not only rendered void their proceedings in laying out and establishing the road as against the land-owners whose land was taken for the road (*State v. Langer*, 29 Wis., 68, and earlier cases in this court), but also rendered void a contract for work on such road let by the commissioners, as against the town which would otherwise be liable for such work.] *Ibid.*
- [3. In the absence of express constitutional restriction, the legislature has power to appoint commissioners to lay out and establish state roads; and the constitutional amendment of 1871 merely limits this power to roads "extending into more than one county."] *Ibid.*
- [4. An act of the legislature appointing commissioners to lay out a state road in two or more counties, and imposing the expense thereof upon such counties, is not in violation of the constitutional provision for uniformity in the system of town and county government. Nor does an act authorizing such commissioners to *open* or construct the road, violate the uniformity of county government. Whether such an act would violate the uniformity of town government, *quære*.] *Ibid.*
- [5. An act of the character above described does not violate the constitutional provision which prohibits the state from carrying on works of internal improvement, nor that which requires the rule of taxation to be uniform.] *Ibid.*
- [6. The legislature has power to compel the levy of taxes by counties, towns and cities for any *municipal* purpose, such as the construction of roads and bridges.] *Ibid.*

STATUTES, CONSTRUCTION OF. See COUNTIES, 11. FORECLOSURE OF MORTGAGE, 6. TAXATION, etc., 8.

STAY OF PROCEEDINGS. See APPEAL (C.), 1.

SUMMONS. See JURISDICTION.

SUPPLEMENTAL ANSWER. See EQUITY, 7.

SUPPLEMENTARY PROCEEDINGS.

1. The circuit court has jurisdiction to punish as for contempt disobedience of a lawful order of a court commissioner, even if the commissioner himself had power to punish such contempt. R. S., sec. 3477. *Nieuwankamp et al. v. Ullman*, 168
2. In a proceeding supplementary to execution, a court commissioner has no authority, in any state of the case, to order a delivery of the debtor's property to the judgment creditor or his attorney, and such an order is absolutely void. *Ibid.*
3. A delivery of the property in obedience to such void order, and in violation of a valid order of another court commissioner, in another proceeding, forbidding the debtor to transfer or dispose of his property until further order therein, is a *voluntary* delivery, and, though *honestly* made, is a *contempt*. But in such a case, where no damage has accrued to the creditor, the punishment should be made nominal. *Ibid.*
4. In several summary proceedings supplementary to executions against the same debtor, returned unsatisfied (R. S., secs. 3028-3038),—such a proceeding being a substitute for a creditor's bill,—the creditor who first commences his proceeding and obtains service of process upon the debtor, and prosecutes the proceeding with proper diligence to the appointment of a receiver, obtains a prior lien upon the assets of the debtor; and a *bona fide* attempt to serve the process is equivalent to actual service in respect to priority of right, as against persons who, being chargeable with notice of the prior proceeding, commenced subsequent proceedings of the same character. *Kellogg et al. v. Collier et al. Collier v. Kellogg et al.*, 649
5. *Actual notice* of the prior proceeding is sufficient, where its pendency was not shown by the records of the court. *Ibid.*
6. K. and C. being severally judgment creditors of X., on whose judgments executions had been returned unsatisfied, K. obtained an order from a court commissioner, March 20th, citing the debtor to an examination on the 27th, and enjoining him from disposing of his property. March 21st, the sheriff, in good faith, made an affidavit in due form, of service of the order on the debtor on the 20th; but in fact the copy order left with such debtor did not show the signature of the commissioner. March 22d, C. obtained a like order from the same commissioner, citing the debtor to an examination on the 24th; and, on the last named day, after a hearing, M. was appointed receiver, and the debtor made an assignment to him in due form the next day; but K. was not made a party or notified of these proceedings. On the 27th, immediately upon the discovery by the sheriff and K. of the defect in the service of the first order, the debtor refusing the sheriff permission to amend the copy served, that officer served a correct copy, and made due return of the facts before the hour at which the order was returnable; and, the proceeding being prosecuted with due diligence, a receiver (other than M.) was appointed therein. *Held*, that upon these facts the court, on motion, should have ordered M. to pay over the assets in his hands to be applied upon K.'s judgment. *Ibid.*

7. The motion of K. for the relief last mentioned should have been entitled in *both* of the actions; but an error in entitling it only in his own action (to which C. was made a party for the purposes of the motion), is *held* merely technical and no ground of reversal. *Ibid.*
- [8. The statute contemplates that different proceedings may be pending at the same time, but requires creditors prosecuting prior proceedings to be notified of the pendency of junior proceedings, and that but one receiver shall be appointed; and it is the proper practice, especially where the first proceeding is diligently prosecuted, to make the appointment in that; but the plaintiff in the junior proceeding should be allowed to proceed with the examination of the debtor, etc. (under sec. 3033), without regard to priorities.] *Ibid.*
- [9. Other rules stated by which proceedings in such cases should usually be governed.] *Ibid.*

SUPREME COURT. See APPEAL (A.). CONTRACTS, 4. CRIMINAL LAW, etc., 3, 16.

SURETYSHIP.

See APPEAL (C.), 1. ASSIGNMENT. BILLS AND NOTES, 1. COUNTIES, 5, 6, 8, 9.

In an action on a bond, where the sureties defended on the ground that the instrument actually signed by them was essentially different from that which they promised to execute and believed themselves to be executing, it was error to admit evidence for the plaintiff that the principal obligor had turned over property to one of said defendants as security against the liability; the taking of such security not being an affirmation by the sureties of their liability on the bond in suit. *Rounsavell v. Wolf et al.* *imp.*, 353

TAXATION, TAX PROCEEDINGS, TAX DEED, Etc.

See STATE ROADS, 6.

1. Under section 72, ch. 18, R. S. 1858, as amended by sec. 1, ch. 124 of 1859, construed in connection with sec. 129, ch. 13, R. S. 1858, as amended by sec. 1, ch. 42 of 1859, a town treasurer is authorized to receive from any single tax-payer, in *county orders*, only a sum equal to the county taxes due from such tax-payer. *Town of Marinette v. Board of Sup'rs*, etc., 216
2. When county orders have been thus received by the town treasurer in payment of the county tax, they are *paid*, and cannot be held by the town as obligations of the county to it. *Ibid.*
3. The statutory form of the town treasurer's warrant (sec. 91, ch. 18, R. S. 1858; sec. 33, ch. 130 of 1868; sec. 1081, R. S. 1878), and other provisions in former and present statutes relating to payments by town treasurers to county treasurers, by which preference is given to the town over the county in respect to *moneys* paid to the town treasurer for taxes (*Winchester v. Tozer*, 24 Wis., 312; *Wolf v. Stoddard*, 25 id., 503), are not in conflict with the provisions relating to *county orders* as above construed; but, if they were so, in terms, the *special* provisions relating to

such orders must prevail over the more *general* provisions in apparent conflict with them. *Ibid.*

4. While it was illegal to include the price of a U. S. revenue stamp (to be affixed to the certificate of sale) in the amount to make which land was sold as for nonpayment of taxes, and the deed might have been avoided for such excess before the three years limitation of the statute expired (*Barden v. Supervisors*, 33 Wis., 445; *Baker v. Supervisors*, 39 id., 447), yet the validity of the sale cannot be questioned on that ground after the time limited has expired. *Milledge v. Coleman*, 184
5. A tax deed, after reciting the sale of the land to the county, further recites that the certificate was by the county treasurer assigned to X. for a specified sum, "which sum was the amount of taxes assessed and due and unpaid on said tract of land, together with costs and charges of such sale due therewith at the time of making such sale, the whole of which sum of money has been paid by the aforesaid purchaser" of the certificate. *Held*, that this is a sufficient compliance with the statute which requires the deed to show the amount for which the land was sold. *Ibid.*
6. The certificate of acknowledgment of a tax deed states that the clerk of the board (naming the person by whom, as clerk, the deed purports to be executed) "came personally before me, to me known to be the person so described in the foregoing instrument, and acknowledged that the same was executed freely and voluntarily, for the uses and purposes therein mentioned." *Held*, that this sufficiently shows an acknowledgment, by said clerk, that the deed was executed by him. *Ibid.*
7. Sec. 33, ch. 22 of 1859, and any similar provision in a city charter, requiring the original owner of land upon which a tax deed has been issued, to deposit in court the amount of the tax, etc., before he can defend an action to bar his right to the land, can be sustained as valid only by construing it to apply to defenses based upon mere *irregularities* in the tax proceedings, and not to those which go to the *groundwork* of the tax itself. *Philleo v. Hiles*, 42 Wis., 527, and other cases in this court. *Tierney v. Union Lumbering Co., imp.*, 248
8. The statutory provision (R. S., sec. 1063) disqualifying an assessor from impeaching by his testimony any affidavit made by him as such assessor, cannot apply where he has failed to make any affidavit; and his neglect to verify the assessment roll as required by law is itself fatal, and may be pleaded as a defense to the action above described, without deposit made. *Ibid.*

TORTS. See ACTION (B.). CHATTEL MORTGAGE, 1-4. CITIES, 3-8. COSTS, 10. DAMAGES, 1-8. EMINENT DOMAIN. EVIDENCE, 3-9, 15-18. FINDING OF FACT. LIBEL. NAVIGABLE RIVER. RAILROADS. SHIPPING. SLANDER.

TOWNS. See ABATEMENT, etc., 1, 2. COUNTIES, 1. DRAINAGE FUND. STATE ROADS, 1, 2. TAXATION, etc., 1-3.

TOWN TREASURER. See DRAINAGE FUND. TAXATION, 1-3.

TRESPASS. See CHATTEL MORTGAGE, 3, 4. DAMAGES, 5-8. EMINENT DOMAIN, 3. FINDING OF FACT.

TRIAL. See EVIDENCE and PRACTICE, and the references there.

TROVER. See DAMAGES, 1-8.

TRUST. See DRAINAGE FUND.

"UNDERSTANDING." See VERDICT, 10 (2).

USURY. See BILLS AND NOTES, 2.3.

VARIANCE.

A variance between the contract pleaded and that proven, by which the appellant was not misled, is disregarded here. *Newhall-House Stock Co. v. F. & P. M. R'y Co.*, 516

VENDOR AND PURCHASER OF LAND.

The grantee of land cannot remain in possession of all the land which he claimed the deed should convey, rest several years after the discovery of an alleged deficiency of the land conveyed, pay the other notes given for the consideration of the conveyance, and then set up the deficiency of the land as a bar to recovery, or ground of recoupment, in an action on the last of such notes. *Delaney v. McDonald*, 108

VENDOR AND PURCHASER OF CHATTELS. See DAMAGES, 5, 9-11.

VENUE. See CHANGE OF VENUE.

VERDICT

See COURT AND JURY. DAMAGES, 1, 2. NEGLIGENCE, 1. REPLEVIN, 1.

1. To the questions, "Could the plaintiff have heard the whistle? If he had stopped his team, etc., could he have heard it?" the jury answered, "He might or might not." *Held*, that such an answer to such questions is not evasive. *Urbanek v. C., M. & St. P. R'y Co.*, 59
2. It is not error to allow the jury, after coming in with a verdict, to retire for the purpose of further considering and perfecting it. *Ibid.*
3. In an action at law, where there is no general verdict, the material issues of fact should be passed upon by the special findings of the jury; and such findings should be so full, clear and consistent, that the proper judgment may be rendered thereon as a legal conclusion from the facts found. *Cotzhausen v. Simon*, 103
4. In an action for damages accruing from defendant's fraudulent misrepresentations in the sale of a mortgage of land, where the misrepresentations were material and false, and defendant had the means of knowing, or ought to have known, that they were untrue, and plaintiff did not know, and had not the present means of knowing, their falsity, and relied upon them as true, it is immaterial whether defendant made them willfully or not. *Ibid.*

5. To the question, whether defendant was aware, at the time of selling the mortgage, that plaintiff was a resident of Milwaukee and had never seen the lands, was unacquainted with their condition and value, and had no time or opportunity to examine for himself, and whether, in buying the mortgage, he relied solely upon defendant's representations, the jury answered, "He did not." *Held*, insufficient, the most material parts of the question being left unanswered. *Ibid.*
6. One of the false representations charged was, that a certain "shrewd and wealthy banker," resident in the vicinity of the property, had taken a mortgage on the same lands as security for a considerable sum, which was the second mortgage thereon *after* that sold to plaintiff; and the question as to this representation is ignored by the findings. *Held*, a material omission. *Ibid.*
7. In replevin, where plaintiff, claiming as mortgagee, has acquired and retains possession by giving the statutory bond, a verdict in his favor, finding him entitled to the possession, need not determine the value of his special interest. *Warner v. Hunt*, 30 Wis., 200, and earlier cases in this court, distinguished. *Woodruff et al. v. King*, 261
8. In an action for the conversion of timber alleged to have been cut from plaintiffs' lands, the special verdict was merely that the timber was cut by a stranger on a certain quarter-section of land, and by such stranger sold to and manufactured and disposed of by the defendant. The evidence was, that plaintiffs, at the time of such cutting, owned only a part of said quarter-section, and there was no finding that the timber was cut on *their* part, and no general verdict. *Held*, that there was nothing to support a judgment in their favor. *Johnson et al. v. Ashland Lumber Co.*, 326
9. Where wood was seized on a judgment two days after the judgment debtor had given a mortgage thereof, the jury, in a suit by the mortgagee against the judgment creditor, were asked to find specially whether the debtor, after he gave the mortgage, continued to sell and deliver wood, in the usual course of his business, out of that mortgaged; and they answered that some of the mortgaged wood was sold, but probably without the mortgagor's knowledge. *Held*, that the answer was not evasive. *Barkow v. Sanger et al.*, 500
10. The jury were further asked, whether it was *understood* between the mortgagor and the mortgagee, when the mortgage was given, that the former might sell the mortgaged wood, and dispose of the proceeds in the usual course of his business; and they answered, "There was no agreement made." *Held*,
 - (1) That if the answer was not responsive to the question, the objection should have been taken when the verdict was received.
 - (2) That an "understanding" between two parties to a contract as to what rights each shall have thereafter in the subject matter of the contract, is an "agreement."
 - (3) That as the court below, in its instructions on submitting the question, correctly used the words "understanding" and "agreement" interchangeably as synonymous, it cannot be assumed that the jury used the latter word evasively. *Ibid.*
11. The court submitted to the jury the question whether the mortgage was given "*without consideration and*" for a certain fraudulent purpose as to creditors; and the jury answered, "It was not." *Held*, that, in view of the instructions given (for which see the opinion), this answer must be treated as merely negating the fraudulent purpose. *Ibid.*

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12. Where the jury, being instructed that plaintiff, if he recovered, was entitled to interest, found his damages at a certain sum, it must be presumed that this included the interest; and a judgment taken for a larger sum, including interest on that named in the verdict, is reversed, with directions to grant a new trial unless plaintiff remit the excess. *Diedrich v. N. W. U. Ry Co.*, 662

VERIFICATION of Complaint. See PRACTICE, 1.

VOTERS. See COUNTIES, 4, 8.

WAIVER. See APPEAL (B.), 3. APPEAL (C.), 2. CONTRACTS, 4. NEW TRIAL. PRACTICE, 4.

WARRANTY. See ACTION (B.). INSURANCE AGAINST FIRE, 3-5.

WITNESS. See COSTS, 7. EVIDENCE, 15.

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